

1979

United States v. Sutton: The Sixth Circuit Curbs Abuse of RICO, the Federal Racketeering Enterprise Statute

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Recommended Citation

Note, United States v. Sutton: The Sixth Circuit Curbs Abuse of RICO, the Federal Racketeering Enterprise Statute, 28 Clev. St. L. Rev. 629 (1979)

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NOTE

UNITED STATES V. SUTTON: THE SIXTH CIRCUIT CURBS ABUSE OF RICO, THE FEDERAL RACKETEERING ENTERPRISE STATUTE*

I. INTRODUCTION

RICO,¹ THE CONTROVERSIAL ANTI-RACKETEERING STATUTE, takes its name from the acronym for "Racketeer Influenced and Corrupt Organizations," the heading under which the statute appears in the United States Code. The statute has come under persistent attack from defendants and commentators for its overbreadth and potential for abuse, yet the courts and federal prosecutors continue to hail it as an essential weapon against organized crime.

At the hub of any RICO offense is the "enterprise." Loosely defined as including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity,"² the "enterprise" element has been at the center of the controversy concerning the statute's scope.³ Prior to the decision in *United States v. Sutton*,⁴ the five circuit courts of appeal considering RICO's scope were in agreement that the statute applied to "enterprises" acquired or conducted for *wholly illegitimate purposes*,⁵

* Editor's Note: As of this printing, the case of *United States v. Sutton* is still pending in the Sixth Circuit, rehearing *en banc*. Recently, the Eighth Circuit has followed a line of reasoning similar to *Sutton*. *United States v. Anderson*, 27 CRIM. L. REP. (BNA) 2518 (8th Cir. Aug. 7, 1980). With these two circuits in conflict with the other five circuits previously considering the scope of RICO, the path seems to be clear to a final resolution of the issue before the United States Supreme Court.

¹ 18 U.S.C. §§ 1961-68 (1976).

² *Id.* § 1961(4).

³ The meaning of "enterprise" has been the single most litigated issue involving the RICO statute. As of this writing, twenty-four reported cases have considered the scope of "enterprise."

⁴ 605 F.2d 260 (6th Cir. 1979), *vacated pending rehearing en banc*, Nos. 78-5134 through 78-5139, 78-5141 through 78-5143 and 78-5074 (6th Cir. Nov. 7, 1979).

⁵ *United States v. Rone*, 598 F.2d 564 (9th Cir. 1979); *United States v. Swiderski*, 593 F.2d 1246 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979); *United States v. Elliott*, 571 F.2d 880 (5th Cir.), *cert. denied sub nom.*, *Delph v. United States*, 439 U.S. 953 (1978); *United States v. Altese*, 542 F.2d 104 (2d Cir. 1976), *cert. denied sub nom.*, *Napoli v. United States*, 429 U.S. 1039 (1977); *United States v. Cappetto*, 502 F.2d 131 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975).

e.g. illegal gambling operations,⁶ prostitution rings,⁷ or loansharking operations.⁸ In *Sutton*, however, a panel for the Sixth Circuit severely limited RICO's application to enterprises "organized and acting for some *ostensibly lawful purpose*."⁹ Thus, by a two-to-one vote, the panel created a conflict among the circuits by requiring some showing that the enterprise in question affected legitimate business before RICO could be invoked. Three months after the *Sutton* decision, the Justice Department successfully petitioned for a rehearing *en banc*, and the original judgment and opinion were vacated pursuant to Sixth Circuit Rule 14.¹⁰ The parties were directed to file supplemental briefs for the rehearing scheduled during the February, 1980 session.¹¹

The full impact of the restrictive holding in *Sutton* does not manifest itself without examination of the operative facts. In *Sutton*, the nine defendants were convicted by a jury on an indictment containing 329 counts. Each defendant was convicted on a substantive RICO count of conducting an "enterprise" affecting interstate commerce through a pattern of racketeering activity¹² and on a conspiracy count to commit that offense.¹³ In addition, each defendant was convicted on one or more of the following offenses committed during the operation of the "enterprise": possession and distribution of heroin,¹⁴ mail fraud,¹⁵ receiving and transporting stolen property,¹⁶ various firearms offenses,¹⁷ and use of a telephone to facilitate illicit drug sales.¹⁸

⁶ See, *e.g.*, *United States v. Cappetto*, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975).

⁷ See, *e.g.*, *United States v. McLaurin*, 557 F.2d 1064 (5th Cir. 1977), *cert. denied*, 434 U.S. 1020 (1978).

⁸ See, *e.g.*, *United States v. Rone*, 598 F.2d 564 (9th Cir. 1979).

⁹ 605 F.2d at 270 (emphasis added).

¹⁰ 6TH CIR. R. 14 provides: "... The effect of the granting of a hearing *en banc* shall be to vacate the previous opinion and judgment of this court, to stay the mandate and to restore the case on the docket as a pending appeal."

¹¹ *United States v. Sutton*, Nos. 78-5134 through 78-5139, 78-5141 through 78-5143 and 78-5074 (6th Cir. Nov. 7, 1979) (order granting rehearing *en banc*).

¹² 18 U.S.C. § 1962(c) (1976). Section 1962(c) provides:

It shall be unlawful for any person employed by or associated with *any enterprise* engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Id. (emphasis added).

¹³ *Id.* § 1962(d) (1976). Section 1962(d) provides: "It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or (c) of this section."

¹⁴ 21 U.S.C. § 842(a)(1) (1976).

¹⁵ 18 U.S.C. § 1341 (1976).

¹⁶ 18 U.S.C. §§ 2314-15 (1976).

¹⁷ 18 U.S.C. §§ 922(a) and (h) (1976).

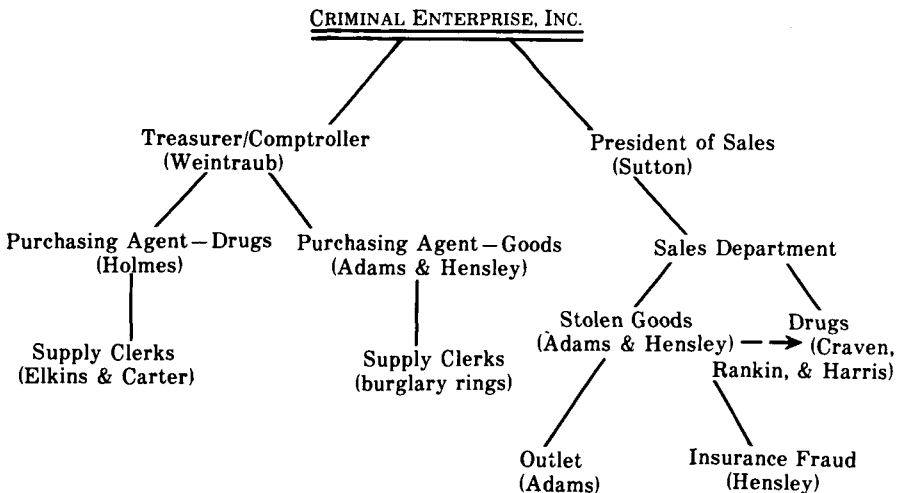
¹⁸ 21 U.S.C. § 843(b) (1976).

The government's evidence revealed an elaborate network of criminal activity with each defendant assuming a specialized role, a characteristic typical of organized crime. The "enterprise," described as a "virtual department store of crime,"¹⁹ had Carl Sutton serving as the main actor in a narcotics distribution business bankrolled by Herschel Weintraub. Weintraub, who was not tried in the *Sutton* prosecution, also financed a fencing operation for stolen property conducted by defendants Adams and Hensley. On occasion, Adams sold the stolen goods from his jewelry store which served as an outlet or "front." The stolen property, mostly household goods, was supplied by various burglary rings. In addition, Hensley participated in an insurance fraud scheme whereby the defrauded companies received falsified receipts for goods allegedly stolen from Hensley's home. The insurance proceeds were then used to purchase narcotics. Other defendants assumed lesser roles in the organization, for the most part engaged in procuring and selling narcotics. In sum, the government's theory relied upon the interrelationship of the individual offenses and their total net effect to prove the existence of a "criminal enterprise."²⁰

On appeal, the defendants launched a paradoxical but successful attack on their RICO convictions. After analyzing the statutory language and the legislative history, the defendants asserted that RICO was in-

¹⁹ 605 F.2d at 274 (Engel, J., dissenting).

²⁰ Throughout the *Sutton* prosecution, the government referred to the defendants' organization as a "criminal enterprise," a term consistent with the interpretation of other circuits that RICO applies to wholly illegal ventures. See 605 F.2d at 263. To illustrate the structured nature of the defendants' "criminal enterprise," it is possible to compile a line-staff organizational chart. (The principal's name appears beneath his "office" and the broken line indicates part-time activities.):



tended to prohibit "only the [criminal] infiltration and operation of *legitimate* enterprises through patterns of racketeering activity."²¹ They argued that because the "enterprise" was conducted for wholly *illegitimate* purposes, the RICO statute was not applicable. The obvious conclusion drawn from this argument is that so long as the defendants could prove their activities were illegal and totally unrelated to legitimate business, they were exempt from the statute's prohibitions.

At first blush, this argument appears absurd, but it was accepted by the *Sutton* majority and serves as the basis for the court's initial reversal of the RICO convictions.²² It also provides the foundation for the court's restrictive holding that a legitimate business, a "front," is an indispensable prerequisite to the invocation of RICO.²³

The *Sutton* decision poses many questions. In a case where the presence of organized crime is evident, why did the majority so severely limit the anti-racketeering statute's application so that its target, organized crime, was beyond its purview? Also, why did the majority allow the confession of illegality to serve as a defense to liability under a criminal statute? Lastly, why did the majority hold contrary to five other circuits and require a showing of legitimacy where the statutory definition of "enterprise" does not specifically require it? This note will attempt to answer these questions. It will examine RICO's intended use as stated by Congress and its expanded use as applied by federal prosecutors. It will finally conclude that the single most debilitating aspect of the statute is its inherent potential for abuse, an aspect of RICO implicitly controlling the *Sutton* majority.

²¹ 605 F.2d at 264 (emphasis added).

²² The cases were remanded for separate trials on the substantive drug, mail fraud, stolen property, and firearms counts. Although each defendant was convicted of one or more of the drug counts, only defendant Hensley participated in the full gamut of related offenses. A joint trial of all defendants would be proper only if all were participants "in the same series of acts or transactions constituting an offense or offenses." FED. R. CRIM. P. 8(b). The majority reasoned that reversal of the RICO counts destroyed the requisite nexus between defendants and offenses. Therefore, without a single "enterprise" to bind the group, they could not be participants in the "same series" of acts. 605 F.2d at 270-71.

In dissent, Judge Engel accepted this reasoning, however he felt that this type of retroactive misjoinder did not warrant reversal of the substantive counts without showing prejudice to the defendants. *See* Schaffer v. United States, 362 U.S. 511 (1960). The district judge had ruled on joinder of parties, severing the trial of Charles Thomas Hill, but refusing severance for the other defendants since sufficient prejudice in joinder was not indicated. By accepting the district judge's ruling, the dissent considers the prejudicial effect of joinder a question fully answered by the trial court, and hence not open for re-examination. 605 F.2d at 274 (Engel, J., dissenting).

²³ The government conceded that the jewelry store owned by Adams and operated as an outlet for stolen goods was not the "enterprise" charged in the indictment. 605 F.2d at 264 n.1.

II. THE CONTROVERSY SURROUNDING THE "ENTERPRISE" ELEMENT

A. Background

RICO has been characterized as the "most sweeping criminal statute ever passed by Congress."²⁴ To understand RICO it is essential to consider the atmosphere in which it was promulgated. Originally enacted as Title IX of the Organized Crime Control Act of 1970,²⁵ RICO was heralded as "providing a means of wholesale removal of organized crime from our organizations, prevention of their return, and, where possible, forfeiture of their ill-gotten gains."²⁶ From its beginning, then, RICO was designed to be a substantive and affirmative weapon against racketeering.

Prior to the enactment of the Organized Crime Control Act, the need for a comprehensive plan to combat organized crime had been recognized. In the early 1950's, the hearings before the Special Senate Committee to Investigate Organized Crime, chaired by Senator Estes Kefauver,²⁷ focused national attention on the threat posed by the criminal underworld. In 1954, the Organized Crime and Racketeering Section of the Department of Justice was specifically formed to meet this threat.²⁸ Governmental investigations of the underworld continued.²⁹ These efforts peaked in 1965 when President Johnson

²⁴ Atkinson, "Racketeer Influenced and Corrupt Organizations," 18 U.S.C. §§ 1961-68: *Broadest of the Federal Criminal Statutes*, 69 J. CRIM. L. & C. 1, 1 (1978).

²⁵ Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970), reprinted in (1970) U.S. CODE CONG. & AD. NEWS 1073.

²⁶ 116 CONG. REC. 591 (1970) (remarks of Sen. McClellan), reprinted in McClellan, *The Organized Crime Act (S. 30) Or Its Critics: Which Threatens Civil Liberties?*, 46 NOTRE DAME LAW. 55, 141 (1970) (emphasis added). In this article, the late Senator McClellan, floorleader and principal draftsman of the Organized Crime Control Act (OCCA), attempted to defend the then unenacted bill, S. 30. Only a small portion of the article deals with RICO, but the article provides a flavor for the other provisions of the OCCA.

²⁷ *Hearings Before the Special Comm. to Investigate Organized Crime in Interstate Commerce*, 81st Cong., 2nd Sess. and 82nd Cong., 1st Sess. (1950-51); S. REP. NO. 307, 82nd Cong., 1st Sess. (1951).

²⁸ Note, *The Strike Force: Organized Law Enforcement v. Organized Crime*, 6 COLUM. J.L. & SOC. PROB. 496, 502 (1970). This note discusses the use of specialized Strike Forces within the Department of Justice's Racketeering Section. At present, the local Strike Forces are charged with implementing RICO, subject to the constant supervision of the Justice Department. The Strike Force concept has been praised as the most successful means of combatting organized crime presently in practice. See Wilson, *The Threat of Organized Crime: Highlighting the Challenging New Frontiers in Criminal Law*, 46 NOTRE DAME LAW. 41, 45 (1970).

²⁹ See *In re Subpoena of Persico*, 522 F.2d 41 (2d Cir. 1975). This case includes an extensive history and bibliography of the efforts to fight organized crime. In addition, it points out the frustrations attendant in the prosecution of racketeers. Persico was a reputed mobster subpoenaed to testify before the grand jury sitting in the Eastern District of New York which was investigating the infiltration

created the President's Commission on Law Enforcement and Administration of Justice. The Commission submitted a report containing twenty-two recommendations directed solely toward the problem of organized crime. These recommendations formed the basis for a long needed comprehensive plan—the Organized Crime Control Act of 1970.³⁰

Throughout this twenty-year inquiry, it was shown that organized crime did not confine its activities to wholly illegal ventures. In fact, Congress recognized the subversion of legitimate business at an early stage.³¹ The report of the Kefauver Committee listed fifty areas where organized crime had infiltrated legitimate business.³²

Since 1951, organized crime has become so pervasive that it is now recognized that no endeavor is immune from its influence and control.³³ Due to the numerous sources of income and "laundering techniques" available to organized crime, it is extremely difficult to determine the dollar cost to society. A conservative estimate of seven to eight billion dollars in annual profits from illegal gambling, narcotics, loansharking, and prostitution has been offered.³⁴ Much of this income is available for investment in legitimate businesses to provide "fronts," or is used in an effort to gain respectability, or simply because there is a great deal of profit in obtaining a legitimate business and running it illegally. One commentator analyzing the methodology and motivation of organized crime's infiltration of legitimate business has discovered an almost symbiotic relationship; organized crime must dispose of its enormous profits

of legitimate businesses by organized crime in violation of RICO section 1962. In spite of being given testimonial immunity, Persico refused to reveal the names of the employees in his illegal gambling business. He was held in contempt of court and sentenced to 60 days in jail. After serving his sentence, he was re-subpoenaed to appear before the same grand jury. Again he was granted immunity and again he refused to testify. Once more he was found in contempt of court and jailed for the remainder of the grand jury's term. After using every device available, the government had failed to gain the desired information.

³⁰ THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME, 16-24 (1967) [hereinafter cited as T.F.R.]. It is apparent that at least five titles of the Organized Crime Control Act are patterned directly after Task Force recommendations. Pub. L. No. 91-452, 84 Stat. 922 (1970), *reprinted in* (1970) U.S. CODE CONG. & AD. NEWS 1073; *Compare*: Title I (Special Grand Jury) *with* T.F.R. at 16; Title IV (False Declarations) *with* T.F.R. at 17; Title V (Protected Facilities for Housing Government Witnesses) *with* T.F.R. at 19; Title VII (Litigation Concerning Sources of Evidence) *with* T.F.R. at 19; Title X (Special Offender Sentencing) *with* T.F.R. at 19.

³¹ See S. REP. NO. 307, 82nd Cong., 1st Sess. 170 (1951).

³² *Id.*

³³ Evidence indicates criminal infiltration of securities firms and the New York Stock Exchange. S. REP. NO. 617, 91st Cong., 1st Sess. 171 (1969).

³⁴ Wilson, *supra* note 28, at 42.

in a "safe" manner while legitimate businesses require continuous influxes of new capital.³⁵

While most of the Organized Crime Control Act was concerned with providing procedural tools for prosecutors, RICO was added as Title IX to provide a substantive tool to prevent the criminal infiltration and corruption of legitimate business by racketeers.³⁶ Most everyone is in agreement that this is the principal purpose of RICO,³⁷ but the consensus ends there. Since RICO was part of a comprehensive plan to fight organized crime, the natural tendency is to concentrate on the whole (organized criminal activity) and forget the component part RICO was designed to attack—infiltration of legitimate business. As a result, federal prosecutors have expanded RICO's use into cases where criminal involvement with legitimate business is totally lacking.³⁸ The question then becomes: Is RICO's purview limited solely to the criminal infiltration and corruption of legitimate business, as it was apparently intended, or does RICO apply to any case involving organized criminal activity, regardless of its connection with legitimate business? This is the essence of the RICO debate: The restrictive view symbolized by the *Sutton* majority versus the expansionist view expressed by the prosecution and the *Sutton* dissent.

Obviously, there must be an ambiguity within the statute that would result in such a fundamental disagreement. Therefore, it is only proper, as the *Sutton* majority states, that an analysis of RICO's scope begin with the statute itself.³⁹

³⁵ See Jester, *An Analysis of Organized Crime's Infiltration of Legitimate Business*, 5 CRIM. JUST. MONOGRAPH 1 (1979).

³⁶ Title IX was originally introduced by Senators McClellan and Hruska as a separate bill, *The Corrupt Organizations Act*. See S. 1861, 91st Cong., 1st Sess., 115 CONG. REC. 9566 (1969). Portions of S. 1861 were based on an earlier bill introduced by Senator Hruska, *The Criminal Activities Profits Act*. S. 1623, 91st Cong., 1st Sess., 115 CONG. REC. 6992 (1969). S. 1861 was later incorporated as an amendment into S. 30, the Organized Crime Control Act of 1970. S. 30 passed through the Senate by an overwhelming vote of 73-1. 116 CONG. REC. 972 (1970). S. 30 passed through the House by another huge majority, 341-26. 116 CONG. REC. 35363 (1970). President Nixon signed S. 30 into law on October 15, 1970. Part of the overwhelming support the legislation enjoyed can be attributed to the fact that 1970 was an election year; a vote against the bill would label the member as "soft on crime," which was especially significant during the heyday of Nixon's law and order years. For a concise history of S. 30, see 26 CONG. Q. ALMANAC 545 (1970).

³⁷ Even in *Sutton*, the majority and dissent agree that RICO's primary aim was to prevent the infiltration of legitimate business by organized crime. 605 F.2d at 267, 273. This fact is also impliedly accepted by the government. Petitioner's Brief for Rehearing *En Banc* at 9, *United States v. Sutton*, 605 F.2d 260 (6th Cir. 1979) [hereinafter cited as *Petitioner's Brief*].

³⁸ See notes 191-213 *infra* and accompanying text.

³⁹ 605 F.2d at 264.

B. *Statutory Construction*

It has been traditionally recognized that there are four possible combinations of legitimate-illegitimate acquisition and operation of businesses. "(1) Some businesses are legitimately purchased with the fruits of crime and operated legitimately. (2) Others are legitimately purchased with the fruits of crime and operated illegitimately. (3) A third possibility involves illegitimate acquisition and legitimate operation. . . . (4) (T)he fourth alternative is to acquire a business illegitimately and then to operate it illegitimately."⁴⁰

The substantive section of RICO, section 1962, covers all of these possibilities by dividing them into acquisition offenses and operating offenses. Section 1962(a)⁴¹ is designed to prevent the *legal investment* of ill-gotten gains, the first possibility.⁴² This section is the most difficult to prove since it requires the tracing of illegally received funds. Note that this particular section applies only to the acquisition of legitimate "enterprises" since it is logically impossible to invest in an "illegitimate enterprise."⁴³ Next, section 1962(b)⁴⁴ is designed to prevent the *illegal ac-*

⁴⁰ D. CRESSEY, *THEFT OF THE NATION* 100 (1969).

⁴¹ 18 U.S.C. § 1962(a) (1976). Section 1962(a) provides in part:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

Id.

⁴² See, e.g., *United States v. McPartland*, Cr. No. 76-52 (D. Or. 1976). In this case, McPartland purchased the Hock Shop Tavern, a bar and restaurant, with funds derived from the sale of marijuana. The Internal Revenue Service, investigating the defendant for tax evasion and using the net worth method of proof, traced the funds to the narcotics operation. Since the Hock Shop Tavern bought liquor and food from out-of-state suppliers, the business affected interstate commerce. McPartland was indicted under section 1962(a) and for two counts of tax evasion, 26 U.S.C. § 7201 (1976). The case was disposed of by the defendant's plea of guilty to the tax evasion counts.

⁴³ The essence of this offense is the legal investment of illegally received funds. It is impossible to legally invest money in a wholly illegitimate enterprise since such investment generally constitutes complicity and is a crime in and of itself. The Justice Department impliedly concurs with this reasoning. See U.S. DEPT OF JUSTICE, CRIMINAL DIVISION, ORGANIZED CRIME AND RACKETEERING SECTION, STRIKE FORCE 18, RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS 4-5 (4th ed. 1977) [hereinafter cited as DEPT JUST. MANUAL].

⁴⁴ 18 U.S.C. § 1962(b) (1976). Section 1962(b) provides: "It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

quisition of an enterprise, the third possibility above.⁴⁵ This section, like section 1962(a), has been consistently limited to the illegal acquisition of legitimate enterprises.⁴⁶ Lastly, section 1962(c)⁴⁷ is designed to prevent the *illegal operation* of an enterprise, the second and fourth possibilities above. However, unlike sections 1962(a) and (b), this section has been invoked against the operations of a multitude of illegitimate enterprises, as well as legitimate ones.⁴⁸ Illegitimate enterprises have also been subject to scrutiny when RICO's conspiracy provision, section 1962(d),⁴⁹ has been applied.⁵⁰ Since illegitimate enterprises are excluded by definition

⁴⁵ See, e.g., *United States v. Gambino*, 566 F.2d 414 (2d Cir. 1977), *cert. denied*, 435 U.S. 952 (1978). The victims owned Terminal Sanitation, a garbage collection firm in New York City. Gambino and Conti also owned garbage collection firms. The defendants "muscle in" on Terminal and forced the owners to pay tribute of \$4,000 per month. Eventually, the defendants became involved in loansharking activities, extracting payments with threats of violence. The defendants controlled garbage collection stops in the Coop City area of the Bronx. While unable to secure a carting license, they required Terminal to pick up the garbage and "kick-back" one-third of all money collected. Terminal was engaged in interstate commerce. The defendants were indicted under section 1962(b), the Hobbs Act, 18 U.S.C. § 1951 (1976), and for extortion, 18 U.S.C. § 894 (1976). Each defendant was convicted and sentenced to 10 years in prison.

⁴⁶ Pragmatically speaking, the government is not interested in protecting the operators of an illegitimate enterprise, such as an illicit gambling house, from "muscling in" by other mobsters. Therefore, this section has not been applied to the illegal acquisition of an illegitimate enterprise. In fact, only section 1962(c) applies in practice to illegitimate enterprises. See DEPT JUST. MANUAL, *supra* note 43, at 20.

⁴⁷ 18 U.S.C. § 1962(c) (1976). See note 12 *supra*.

⁴⁸ See, e.g., *United States v. Aleman*, 609 F.2d 298 (7th Cir. 1979) (burglary rings); *United States v. Diecidue*, 603 F.2d 535 (5th Cir. 1979); *United States v. Rone*, 598 F.2d 564 (9th Cir. 1979); *United States v. Malatesta*, 583 F.2d 748 (5th Cir. 1978), *aff'd en banc*, 590 F.2d 1379, *cert. denied*, 440 U.S. 962 (1979); *United States v. Elliott*, 571 F.2d 880 (5th Cir.), *cert. denied sub nom.*, *Delph v. United States*, 439 U.S. 953 (1978) (hybrid criminal enterprises involving combinations of criminal activity including counterfeiting, drug dealing, gambling, dealing in stolen goods and murder); *United States v. Swiderski*, 593 F.2d 1246 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979) (drug rings); *United States v. Clemones*, 577 F.2d 1247 (5th Cir. 1978); *United States v. McLaurin*, 557 F.2d 1064 (5th Cir. 1977), *cert. denied*, 434 U.S. 1020 (1978) (prostitution); *United States v. Altese*, 542 F.2d 104 (2d Cir. 1976), *cert. denied sub nom.*, *Napoli v. United States*, 429 U.S. 1039 (1977); *United States v. Hawes*, 529 F.2d 472 (5th Cir. 1976); *United States v. Cappetto*, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975) (gambling); *United States v. Castellano*, 416 F. Supp. 125 (E.D.N.Y. 1975) (loan sharking).

⁴⁹ 18 U.S.C. § 1962(d) (1976). See note 13 *supra*.

⁵⁰ Section 1962(d) is utilized by federal prosecutors in lieu of the general federal conspiracy statute, 18 U.S.C. § 371 (1976). The RICO conspiracy provision allegedly "provides the tactical latitude which is necessary to meet certain patterns of criminal activity." DEPT JUST. MANUAL, *supra* note 43, at 27. In other

from the scope of section 1962(a)⁵¹ and in a practical sense from the scope of 1962(b),⁵² only sections 1962(c) and (d) will be considered herein; their application to illegitimate enterprises is at the very root of the *Sutton* controversy.

Before an analysis of the statute's scope can commence it is important to understand how RICO works. The elements of section 1962(c) can be outlined as follows: It shall be unlawful for any person⁵³ employed by or associated with⁵⁴ any enterprise⁵⁵ affecting interstate commerce⁵⁶ to conduct such enterprise's affairs, directly or indirectly⁵⁷ through a pattern⁵⁸

words, the traditional "chain" and "wheel" conspiracy theories, developed in *Blumenthal v. United States*, 332 U.S. 539 (1947) and *Kotteakos v. United States*, 328 U.S. 750 (1946), are supplanted by the new concept of "enterprise conspiracy." This supplantation has been severely criticized. See Note, *Elliott v. United States: Conspiracy Law and the Judicial Pursuit of Organized Crime Through RICO*, 65 VA. L. REV. 109, 113-14 (1979). The *Sutton* majority also rejected this new concept of "enterprise conspiracy" on vagueness grounds. 605 F.2d at 266.

⁵¹ See notes 41-43 *supra* and accompanying text.

⁵² See notes 44-46 *supra* and accompanying text.

⁵³ "Person" is defined by 18 U.S.C. § 1961(3) (1976). "'Person' includes any individual or entity capable of holding a legal or beneficial interest in property." *Id.*

⁵⁴ This element is not defined in the statute, but a group of defendants attempted to use the terms "associated with" to limit the statute's scope and thereby cause dismissal of their indictments in *United States v. Forsythe*, 429 F. Supp. 715 (W.D. Pa. 1977), *rev'd*, 560 F.2d 1127 (3d Cir. 1977). The defendants were a group of Pennsylvania magistrates and constables indicted under section 1962(c) for receiving kickbacks from a bail-bond agency in exchange for referrals of prisoners brought before their courts. The defendants claimed that "associated with" was limited to those persons "inside" the bail-bond enterprise rather than those "outside," like themselves. That is, "associated with" covers only those persons actually employed by the agency although not receiving regular wages, such as agents, attorneys, etc. Based on this argument the district court dismissed the indictments. 429 F. Supp. at 725. The Third Circuit reversed, preferring an expansive reading of the statute. 560 F.2d at 1136.

⁵⁵ "Enterprise" is defined at 18 U.S.C. § 1961(4) (1976). See note 2 *supra* and accompanying text.

⁵⁶ RICO was enacted under the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3; hence, every offense charged under RICO requires a showing that the enterprise have at least a minimal effect on interstate commerce. See *United States v. Capetto*, 502 F.2d 1351, 1356 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975) (RICO is a valid exercise of the commerce power).

⁵⁷ Conducting an enterprise is the essence of the offense. See note 61 *infra* and accompanying text.

⁵⁸ "[P]attern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter (Oct. 15, 1970) and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5) (1976).

of racketeering activity⁵⁹ or collection of unlawful debts.⁶⁰ In essence, this section "outlaws the use of an enterprise to commit illegal acts."⁶¹ The first and foremost requirement in making out a RICO violation is the "enterprise." The definition of an enterprise as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity,"⁶² is broad enough to be nearly all-inclusive. Next, there must be some showing that the enterprise affects interstate commerce.⁶³ Finally, RICO is designed to be used against organized crime, not isolated criminal endeavors, hence a *pattern* of racketeering activity is required.⁶⁴ These three requirements are essential to proving any RICO offense, not just those arising under section 1962(c).⁶⁵

⁵⁹ Offenses constituting racketeering activity are listed at 18 U.S.C. § 1961(1) (1976). The two requisite acts referred to in section 1961(5) can be achieved through any combination of twenty-four federal crimes or eight state crimes listed in the section.

The legislative purpose behind listing the acts which comprise racketeering, rather than defining racketeering through a list of attributes, is to avoid constitutional challenges based on vagueness. As a result, being a member of "organized crime" is not a statutory prerequisite to the application of RICO. *United States v. Campanale*, 518 F.2d 352, 363 (9th Cir. 1975), *cert. denied sub nom.*, *Grancich v. United States*, 423 U.S. 1050, *rehearing denied*, 424 U.S. 950 (1976).

⁶⁰ "Unlawful debt" is defined at 18 U.S.C. § 1961(6) (1976).

⁶¹ DEP'T JUST. MANUAL, *supra* note 43, at 20.

⁶² 18 U.S.C. § 1961(4) (1976).

⁶³ See note 56 *supra*.

⁶⁴ See notes 58-59 *supra*.

⁶⁵ See, e.g., *United States v. Huber*, 603 F.2d 387 (2d Cir. 1979). The fact pattern in *Huber* epitomizes the type of activity RICO was designed to prevent, although the case is atypical in that it does not involve organized racketeers. Karl R. Huber was a 1965 graduate of Harvard Law School and a member of the New Jersey bar. Instead of working for a Newark law firm as planned, Huber joined his father in acquiring an established hospital and surgical supply business (HEC). HEC entered into numerous cost-plus contracts with hospitals in New York and New Jersey for the sale of various goods. The net mark-up in the contracts was fixed between 5-8%. After the Hubers acquired HEC, they directed their employees to inflate the manufacturers' costs quoted to the hospitals. Invoices were falsified when necessary, and freight was charged to the hospital when, in fact, it had not been incurred. As a result of these fraudulent practices, the actual mark-up to the defendants was between 18-29%. The over charges totalled about \$471,000, mostly subject to reimbursement by the federal government. There was evidence that the mail service was used in the scheme to defraud. Huber was charged with violating RICO section 1962(c), and with counts alleging general conspiracy, mail fraud, making false statements to a grand jury, plus other related offenses. He was convicted and sentenced to prison terms totalling four consecutive years, fines totalling \$108,000, forfeiture of HEC, plus prosecution fees equalling \$19,412.72. Note that the three RICO requirements were established: 1) the legitimate enterprise was HEC; 2) it affected interstate commerce; and 3) the repeated fraudulent misrepresentations through the mails constituted a pattern of racketeering activity. 18 U.S.C. § 1962(c) (1976).

It is evident that the existence of an "enterprise" is the most significant element within the statute. Because the statute does not specifically differentiate between legitimate and illegitimate enterprises, the definition of "enterprise" has been the vehicle used to extend RICO to illegitimate organizations. For example, the government's brief in *Sutton* asserts that the "criminal enterprise" conducted by Sutton, Weintraub, and the others constituted a "group of individuals associated in fact,"⁶⁶ and therefore the RICO statute was applicable. In support of this conclusion, the government contends that section 1961(4) refers to three groups of enterprises: 1) recognized legal entities ("any individual, partnership, corporation, association or other legal entity");⁶⁷ 2) unions;⁶⁸ and 3) all other enterprises, including illegitimate ones, i.e., "group(s) of individuals associated in fact although not a legal entity."⁶⁹ In addition, the government attaches significance to the word "any" preceding "enterprise" in sections 1962(a), (b) and (c),⁷⁰ and the word "includes" used to introduce the textual definition of "enterprise."⁷¹ It is argued that Congress' use of the word "any" manifests an intention that RICO apply to all enterprises, legitimate and illegitimate alike, and that the use of this broad term is especially significant since Congress could have easily limited RICO's scope by using the restrictive term "any *legitimate* enterprise" if in fact such limitation had been intended.⁷² Moreover, the Congressional use of the word "includes" to introduce the definition of "enterprise" is said to manifest an intent that the definition be il-

⁶⁶ Petitioner's Brief, *supra* note 37, at 7; 605 F.2d at 265.

⁶⁷ 18 U.S.C. § 1961(4) (1976).

⁶⁸ There is some support for viewing unions as a special consideration. See S. REP. NO. 617, 91st Cong., 1st Sess. 98 (1970); 116 CONG. REC. 591 (1970). The government finds additional support from the fact that the "phrase [any union] is not situated in the list of illustrations before 'other legal' because of the traditional legal questions that have arisen as to whether unions are separate and apart from their members and can be sued as an organization or whether the individuals must be sued." Petitioner's Brief, *supra* note 37, at 6 (citing *North American Coal Corp. v. Local 2262, UMW*, 497 F.2d 459, 466-67 (6th Cir. 1974)). This argument does not explain the inclusion of "association" in the "other legal" section, some of which are also not suable *per se*. Petitioner's Brief, *supra* note 37, at 6.

⁶⁹ Petitioner's Brief, *supra* note 37, at 6.

⁷⁰ *Id.*, at 5; 605 F.2d at 264.

⁷¹ "[E]nterprise' includes any individual, partnership, . . ." 18 U.S.C. § 1961(4) (1976) (emphasis added).

⁷² This argument is not new, in fact it was utilized in the earliest cases. See *United States v. Altese*, 542 F.2d 104, 106 (2d Cir. 1976) *cert. denied sub nom.*, *Napoli v. United States*, 429 U.S. 1039 (1977); *United States v. Cappetto*, 502 F.2d 1351, 1359 (7th Cir. 1974) *cert. denied*, 420 U.S. 925 (1975); *United States v. Castellano*, 416 F. Supp. 125, 129 (E.D.N.Y. 1975). *But see United States v. Moeller*, 402 F. Supp. 49, 59 (D. Conn. 1975).

lustrative and not exhaustive.⁷³ As a result, the list of entities (individuals, partnerships, etc.) is not truly complete and illegitimate entities should also be considered part of the definition.⁷⁴

Frequently, this semantic analysis is coupled with another unique feature of RICO. Title IX, as enacted, contained a section which stated that "[t]he provisions of this title shall be liberally construed to effectuate its remedial purposes."⁷⁵ This liberal construction clause facilitates the expansive reading of "enterprise" offered by the government,⁷⁶ and, as a result, it has been repeatedly employed by the pre-*Sutton* opinions sympathizing with the government's expansive view.⁷⁷ RICO, however, is a criminal statute and as such is subject to strict construction. As the traditional canon states, "[a]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."⁷⁸

The dilemma immediately presented is whether the liberal construction clause can be used to circumvent the traditional canon requiring strict construction of a criminal statute. In the context of liberally construing the meaning of "enterprise" to reach illegitimate organizations, it seems clear that the liberal construction clause cannot have this effect. Certainly, the *Sutton* majority would agree,⁷⁹ as would the other courts refusing to employ the liberal construction clause.⁸⁰ It should be

⁷³ The government has previously indicated that Congress makes use of the verb "means" when it intends an exhaustive definition, as in the case of "racketeering activity" in section 1961(1). See *United States v. Thevis*, 474 F. Supp. 134, 138 (N.D. Ga. 1979). The United States Supreme Court has also recognized this differentiation in the Congressional use of the terms "includes" and "means." See *Fed. Land Bank of St. Paul v. Bismark Lumber Co.*, 314 U.S. 95, 99-100 (1941) (interpreting § 26 of the Federal Farm Loan Act to determine if petitioner was exempt from paying \$8.02 in state sales tax); *Helvering v. Morgan's, Inc.*, 293 U.S. 121, 125 n.1, (1934) (interpreting the phrase "taxable year" defined at § 200(a) of the Revenue Act of 1926).

⁷⁴ See *United States v. Huber*, 603 F.2d 387, 394 (2d Cir. 1979); *United States v. Thevis*, 474 F. Supp. 134, 138 (N.D. Ga. 1979).

⁷⁵ Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970).

⁷⁶ See Petitioner's Brief, *supra* note 37, at 9.

⁷⁷ See, e.g., *United States v. Huber*, 603 F.2d 387, 394 (2d Cir. 1979); *United States v. Grzywacz*, 603 F.2d 682, 686 (7th Cir. 1979); *United States v. Swiderski*, 593 F.2d 1246, 1248 (D.C. Cir. 1978), *cert. denied* 441 U.S. 933 (1975); *United States v. Elliott*, 571 F.2d 880, 899 (5th Cir. 1978), *cert. denied sub nom.*, *Delph v. United States*, 439 U.S. 953 (1978); *United States v. Frumento*, 563 F.2d 1083, 1092 (3d Cir. 1977); *United States v. Forsythe*, 560 F.2d 1127, 1135 (3d Cir. 1977); *United States v. Altese*, 542 F.2d at 106; *United States v. Vignola*, 464 F. Supp. 1091, 1096 (E.D. Pa. 1979).

⁷⁸ *Rewis v. United States*, 401 U.S. 808, 812 (1971).

⁷⁹ 605 F.2d at 269.

⁸⁰ See, e.g., *United States v. Davis*, 576 F.2d 1065, 1071 (3d Cir. 1978); *United States v. Nerone*, 563 F.2d 836, 853 (7th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978); *United States v. Mandel*, 415 F. Supp. 997, 1022 (D. Md. 1976); *United States v. Moeller*, 402 F. Supp. 49, 59 (D. Conn. 1975).

noted that RICO contains numerous civil remedies patterned after antitrust law.⁸¹ These remedies were specifically developed to attack organized crime's pocketbook, an area previously unscathed.⁸² It is toward these civil remedies that the liberal construction clause is directed, not toward the criminal provisions of the statute such as section 1961(4), which are still subject to strict construction.⁸³ Therefore, the employment of the liberal construction clause to expand RICO to illegitimate enterprises is misplaced.

The *Sutton* majority also asserts that the government misread section 1961(4), the definition of "enterprise." The majority rejects the government's tripartite grouping⁸⁴ and instead dichotomizes the definition.⁸⁵ The first part of the dichotomy, recognized legal entities (individuals, partnerships, corporations), parallels the government's reading. However, the second part, "entities without formally recognized legal personalities," lumps unions with "group(s) of individuals associated in fact."⁸⁶ The implication drawn from this dichotomy is that while each part refers to a legitimate enterprise, the difference between groups is in formal legal recognition, not the enterprise's legitimate or illegitimate function.⁸⁷ It follows, and the majority forthrightly asserts

⁸¹ 18 U.S.C. § 1964 (1976). The civil remedies allow for divestiture, injunction, and dissolution. The obvious advantage to the government in seeking these remedies lies in the fact that a lesser standard of proof (preponderance of the evidence) suffices. Section 1964(c) also allows citizen suits to recover treble damages. In addition, section 1965 relaxes traditional venue requirements. *Id.* § 1965. See *Farmers Bank of Delaware v. Bell Mortgage Corp.* 452 F. Supp. 1278 (D. Del. 1978). The remaining sections, 18 U.S.C. §§ 1966-1968 (1976), involve speedy trials, trials closed to the public, and extensive liberalizations of discovery procedures. It is clear that these measures are remedial in nature and therefore particularly subject to the liberal construction clause.

⁸² See generally Note, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity,"* 124 U. PA. L. REV. 192 (1975).

⁸³ The Supreme Court recently reaffirmed its traditional stance favoring lenity where the ambit of a criminal statute is concerned in *Dunn v. United States*, 442 U.S. 100 (1979). Interestingly, *Dunn* involved Title IV of the Organized Crime Control Act, which covers making false declarations to a grand jury. Justice Marshall stated for the majority that "[t]his practice (of favoring lenity) reflects not merely a convenient maxim of statutory construction. Rather, it is rooted in fundamental principles of due process, which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited." *Id.*, at 105. Thus, in *Sutton*, the canon favoring lenity appears to mean that RICO should not be extended to illegitimate enterprises unless specifically stated.

⁸⁴ See notes 61-63 *supra* and accompanying text.

⁸⁵ 605 F.2d at 265.

⁸⁶ *Id.*

⁸⁷ From a grammatical standpoint, this interpretation seems reasonable. The definition combines two clauses joined by a coordinating conjunction—"and"—with a comma inserted before the conjunction for clarity. In addition, the majority interpretation conforms to the dictates of the doctrine of *ejusdem generis* which requires that where general words, such as "individuals associated in fact,"

that section 1961(4) does not indicate "what attributes or activities these units must assume or undertake before they are deemed an 'enterprise' in any meaningful sense. . . . Individuals and groups do not become 'enterprises' except in relation to something they do."⁸⁸ In *Sutton*, the "something done" by the enterprise was racketeering. According to the majority, acceptance of the government's view results in the creation of an "enterprise" any time a "pattern of racketeering activity" is established.⁸⁹ The extreme example the majority provides is an individual who robs two banks⁹⁰ for the purpose of making money.⁹¹ The logical result of the government's theory is to make RICO a mere prohibition on racketeering activity so that any reference to "enterprises" is excess verbiage.

This entire statutory analysis makes one thing clear: RICO's fatal ambiguity is that its scope is never clarified. It is not known whether illegitimate enterprises are included or excluded. The expansive view accepted in five circuits is appealing because it maximizes the statute's application to criminal endeavors, like those in *Sutton*. The restrictive view, articulated by the *Sutton* majority, offers crisp reasoning and control on a statute pregnant with the potential for abuse.⁹² Each view has merit, but neither can be said to be conclusive. As a result, the next step in the analysis of RICO's scope is to examine the legislative history to determine the intent of Congress, the body that originally created the problem.

C. Legislative History

The *Sutton* majority prefaces its discussion of RICO's legislative history with the statement that the history "is remarkable for the clarity with which it speaks to the issue of the intended scope of the 'enterprise' element of the crime."⁹³ Others arguing *Sutton's* restrictive view have also made this statement.⁹⁴ Those arguing the expansive view,

follow words of a particular meaning, such as "union," the general words are construed in light of the specific and not given the widest possible meaning. As a result, "union," which is a legitimate organization, characterizes the attributes of "individuals associated in fact," hence "individuals associated in fact" must also, necessarily, be legitimate organizations. See *United States v. Altese*, 542 F.2d at 107 (Van Graafeiland, J., dissenting); *But see United States v. Frumeto*, 563 F.2d 1083, 1091 (3d Cir. 1977).

⁸⁸ 605 F.2d at 265.

⁸⁹ *Id.*

⁹⁰ *Id.* at 266.

⁹¹ The enterprise is bank robbing; as members of the Federal Reserve, banks engage in interstate commerce, and the two robberies constitute a pattern under 18 U.S.C. § 1961(5) (1976).

⁹² See notes 161-220 *infra* and accompanying text.

⁹³ 605 F.2d at 266-67.

⁹⁴ See *United States v. Altese*, 542 F.2d at 108 (Van Graafeiland, J., dissenting); Note, *supra* note 60 at 116.

however, have generally sought to avoid RICO's history because it is mostly unfavorable to their cause.⁹⁵ In any event, the fact remains that the term "enterprise" is *never discussed* in the legislative history, other than its actual inclusion in the text of the statute. As a result, the legislative history can never conclusively settle the debate of whether RICO was intended to include illegitimate enterprises as well as those that are legitimate.

RICO's history still provides general clues as to its intended scope, most supporting *Sutton's* restrictive holding. Even a cursory review of the relevant legislative documents will bear this out. From its date of introduction,⁹⁶ through the Senate hearings,⁹⁷ the Senate report,⁹⁸ the House hearings,⁹⁹ and the House report,¹⁰⁰ the over-riding theme was

⁹⁵ The Seventh Circuit in an early opinion attempted to use RICO's legislative history to justify its application to illegitimate enterprises with disastrous results. Citing the Senate Report on the Organized Crime Control Act, S. REP. NO. 617, 91st Cong., 1st Sess. 72-73 (1969), the court stated that RICO was especially designed to prohibit illegal gambling businesses, the implication being that RICO covered illegitimate enterprises. *United States v. Cappetto*, 502 F.2d 1351, 1358 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975). The problem was that the court cited the portion of the Senate report dealing with Title VIII, directed toward syndicated gambling, not RICO (Title IX). This error was discovered by a New York district court in *United States v. Castellano*, 416 F. Supp. 125, 129 (E.D.N.Y. 1975) and by a student commentator. Note, *supra* note 82, at 202. The Seventh Circuit recognized its error in *United States v. Nerone*, 563 F.2d 836, 853-54 (7th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978), but nevertheless reaffirmed its holding that RICO applied to illegitimate enterprises. *United States v. Aleman*, 609 F.2d 298 (7th Cir. 1979).

⁹⁶ While introducing S. 1861, the bill which later became Title IX of S. 30 (RICO), Senator McClellan stated: "To aid in the pressing need to remove organized crime from legitimate organizations in our country, I have thus formulated this bill. . . . This bill is designed to attack the infiltration of legitimate business repeatedly outlined by investigators of various congressional committees and (the) President's Crime Commission." 115 CONG. REC. 9568 (1969). For the history of S. 1861, see note 36 *supra*.

⁹⁷ *Hearings on Measures Relating to Organized Crime Before Subcomm. on Criminal Laws and Procedures of the Sen. Comm. on the Judiciary*, 91st Cong., 1st Sess. (1969) [hereinafter cited as *Senate Hearings*]. The concern of the committee with Syndicate infiltration of legitimate business was manifested by the fact that they called the chairman of the Chamber of Commerce's Advisory Panel on Crime Prevention, Donald F. Taylor, who summarized the problem and endorsed S. 1861 as a remedy. *Id.*, at 413-21 (1969) (remarks of Donald F. Taylor).

⁹⁸ SENATE COMM. ON THE JUDICIARY, REPORT ON THE ORGANIZED CRIME CONTROL ACT OF 1969, S. REP. NO. 617, 91st Cong., 1st Sess. (1969) [hereinafter cited as SENATE REPORT].

⁹⁹ *Hearings on S. 30, and Related Proposals Relating to the Control of Organized Crime Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2nd Sess. (1970) [hereinafter cited as *House Hearings*].

Although opposition to some portions of S. 30, including RICO, became evident in the House hearings, everyone who testified spoke only to RICO's application to criminal infiltration of legitimate business. Again, the emphasis was on

RICO's employment in removing organized crime from legitimate business. During the floor debates in both the Senate and the House of Representatives, the consensus among proponents and dissenters alike was that RICO was primarily intended "to root out the influence of organized crime in legitimate business into which billions of dollars of illegally obtained money is channelled and which is often used, along with violence, to drive out legitimate competitors."¹⁰¹ It is significant that even the Justice Department seemed to recognize this limited scope of the statute.¹⁰²

There are two exceptions to this overwhelming emphasis on racketeer infiltration of *legitimate* business, both are cited by the government to support its expansive reading.¹⁰³ The first instance occurred in an exchange between Senators Hruska, McClellan, and Magnuson

the infiltration and remedial aspects of the statute, as indicated by various comments of its proponents, *id.*, at 106 (remarks of Sen. McClellan); *id.* at 548 (remarks of American Bar Assoc. president-elect, Edward L. Wright); and of its opponents, *id.* at 291 (remarks of Sheldon H. Elsen, Chairman of N.Y.C. Bar Association Comm. on Fed. Legis.); *id.* at 499 (remarks of Lawrence Speiser, director of Washington office, ACLU).

¹⁰⁰ HOUSE COMM. ON THE JUDICIARY, REPORT ON ORGANIZED CRIME CONTROL ACT OF 1970, H. REP. NO. 1549, 91st Cong., 2nd Sess. (1970), *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 4007 [hereinafter cited as HOUSE REPORT].

The House Report repeated the same comments relating to "enterprise," *id.* at 56, at 4032, and section 1962(c), *id.* at 57, at 4033, as the SENATE REPORT, *supra* note 98. But in addition, the House Report includes the dissenting views of Representatives Conyers, Mikva, and Ryan. HOUSE REPORT, *supra* this note, at 181, at 4076. Significantly, all speak to infiltration of legitimate business.

¹⁰¹ 116 CONG. REC. 603 (1970) (remarks of Sen. Yarborough). In opening the floor debates, Senator McClellan set the tone in his statement that "Title IX is aimed at removing organized crime from legitimate organizations." *Id.* at 591 (remarks of Sen. McClellan). This same theme continued throughout the debates. *See id.* at 602 (remarks of Sen. Hruska), *id.* at 607 (remarks of Sen. Byrd); *id.* at 802 (remarks of Sen. Scott); *id.* at 953 (remarks of Sen. Thurmond).

In the House, although dissent was more prevalent, the only theme was, again, infiltration of legitimate business. *See id.* at 35295 (remarks of Rep. Poff), *id.* at 35208 (remarks of Rep. Ryan), *id.* at 35304 (remarks of Rep. Railsback). At one point, Representative Poff made the sweeping statement that "an attack must be made on their source of economic power itself, and the attack must take place on all available fronts." *Id.* at 35193 (remarks of Rep. Poff). The government cites this statement to buttress an expansive reading of "any enterprise." Petitioner's Brief, *supra* note 37, at 12. Throughout his address, however, Representative Poff referred to the inadequacy of the traditional remedies in controlling the infiltration of legitimate business. His sweeping statement was made in connection with his support for RICO's criminal forfeiture remedy, and not with the scope of RICO's application.

¹⁰² *See, Senate Hearings, supra* note 97, at 387 (1969); Report of Attorney General Richard G. Kleindienst to Subcommittee chairman John L. McClellan, *reprinted in id.*, at 404; *House Hearings, supra* note 99, at 170.

¹⁰³ Petitioner's Brief, *supra* note 37, at 11-12.

during the Senate debates on Title IX (RICO).¹⁰⁴ Senator Magnuson expressed concern over the Judiciary Committee's possible encroachment on the Commerce Committee's authority by formulating RICO. During the exchange, the scope of Title IX was discussed:

Mr. McClellan: . . . One purpose of Title IX is directed to funds which are received from illicit activities, funds that ought play no role in interstate commerce. For example, if it is organized gambling.—

Mr. Magnuson: If it is illegal gambling.

Mr. McClellan: Yes; if it is illegal gambling, engaged in by syndicates of shylocking or whatever, and those funds are used for investment in legitimate business in interstate commerce that would constitute a crime under Title IX. That kind of activity is what we are trying to prevent.

Mr. Magnuson: I think that clears up the matter. Also, I suppose the proceeds from illegal activities in one State that are transported to another State, to be used in further illegal activities would be included?

Mr. Hruska: *They might be involved in Title IX. . . .*¹⁰⁵

Obviously, an illegal gambling operation would constitute an "illegitimate enterprise." The other instance occurred in a speech by Senator McClellan after the Organized Crime Control Act (S. 30) had cleared the Senate, but had run into opposition in the House. The New York City Bar Association Committee on Federal Legislation viewed section 1961(1), defining "racketeering activity" through a list of federal offenses, as too inclusive, thereby leading to the misapplication of RICO against persons not engaged in organized crime. One of the objectionable federal offenses listed was the unlawful use of a stolen credit card.¹⁰⁶ Senator McClellan answered this criticism by stating, "[c]redit card offenses illustrate my point extremely well, because while they are commonly committed by persons having no organized crime connections, organized crime has made big business out of dealing in stolen and counterfeit credit cards, sometimes selling \$250 kits, each with a credit card and proof of identity."¹⁰⁷ As the government points out, there is nothing "ostensibly lawful" in selling stolen credit cards with phoney proof of identity.¹⁰⁸ Neither of these instances expressly advocates RICO's application to illegitimate enterprises and both should be read in light of the abundant evidence to the contrary.

Other than these two plain exceptions, the government's argument

¹⁰⁴ 116 CONG. REC. 844 (1970).

¹⁰⁵ *Id.* (emphasis added).

¹⁰⁶ See *House Hearings*, *supra* note 99, at 329.

¹⁰⁷ 116 CONG. REC. 18940 (1970), *reprinted in*, McClellan, *supra* note 26, at 143.

¹⁰⁸ Petitioner's Brief, *supra* note 37, at 11.

that the legislative history supports the expansive view follows the same pattern as its analysis of the statutory language; most of the emphasis is placed on isolated terms and inferences therefrom.¹⁰⁹ For example, the government finds support for the expansive view in the statute's title, "Racketeer Influenced and Corrupt Organizations." They asserted that Congress meant for "Racketeer Influenced" to refer to organized crime's involvement with legitimate business while "Corrupt Organizations" refers to "organizations or enterprises that are inherently corrupt."¹¹⁰ Not only is this argument superficial, Congress never made this distinction.¹¹¹

The government also places reliance on the statute's statement of purpose.¹¹² "Congress was very explicit when it stated that 'it is the purpose of this act to seek the eradication of organized crime . . . by establishing new penal prohibitions and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.'"¹¹³ Further, it is asserted that the Congressional findings make it clear that Congress was not solely concerned with organized crime's infiltration of legitimate business.¹¹⁴ In its fourth finding, Congress stated that all of "organized crime(s) activities, not just the corruption of legitimate businesses, were weakening the stability of the nation's economic system and causing other problems."¹¹⁵ The logical inference drawn from these statements is that Congress intended a wide ranging attack on *all aspects* of organized crime's activities, and therefore to limit RICO to legitimate enterprises contravenes this intent.

This argument seems convincing and has been accepted by some courts.¹¹⁶ However, in its second and third findings, Congress also stated:

¹⁰⁹ See notes 66-74 *supra* and accompanying text.

¹¹⁰ Petitioner's Brief, *supra* note 37, at 4.

¹¹¹ Both terms, "Racketeer Influenced" and "Corrupt Organizations" referred to the same piece of legislation, S. 1861. See 115 CONG. REC. 9566, 9568 (1969). S. 1861 was entitled the Corrupt Organizations Act. Upon enactment, however, it was to become Chapter 96 of Title 18 of the United States Code and be labeled "Racketeer Influenced Organizations." When S. 1861 was incorporated into S. 30, the label became "Racketeer Influenced and Corrupt Organizations" (RICO). The title changes were insignificant and not due to any intervening substantive changes.

¹¹² Statement of Findings and Purpose, Pub. L. No. 91-452, § 1, 84 Stat. 922 (1970), reprinted in [1970] U.S. CODE CONG. & AD. NEWS 1073.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Petitioner's Brief, *supra* note 37, at 3.

¹¹⁶ See *United States v. Grzywacz*, 603 F.2d 682, 687 (7th Cir. 1979); *United States v. Altese*, 542 F.2d at 106.

(2) Organized Crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of stolen property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) *this money and power are increasingly used to infiltrate and corrupt legitimate business* and labor unions and to subvert and corrupt our democratic processes.¹¹⁷

Since the Congressional Statement of Findings and Purpose applies to all eleven titles of the Organized Crime Control Act, not just Title IX,¹¹⁸ it is reasonable to assume that the third finding is the only finding directly applicable to Title IX (RICO). Therefore, it appears the provisions cited by the government actually refer to other titles.¹¹⁹

Not all of the government's assertions regarding RICO's history are so easily rebutted. As noted previously, RICO was the product of two bills separately introduced by Senators Hruska and McClellan.¹²⁰ The first bill, S. 1623—the Criminal Activities Profits Act—was introduced on March 20, 1969 and was designed to prohibit the investment of money that either was received from specified criminal activities or was intentionally unreported for federal income tax purposes.¹²¹ The bill's stated objectives made it clear that it was aimed at halting racketeer infiltration of legitimate business.¹²² Its substantive provisions prohibited investment in "any business enterprise."¹²³ This term was undefined but

¹¹⁷ Statement of Findings and Purpose, *supra* note 112 (emphasis added).

¹¹⁸ United States v. Grzywacz, 603 F.2d 682, 690 n.1 (7th Cir. 1979) (Swygert, J., dissenting).

¹¹⁹ Perhaps, this entire emphasis on the broad Congressional Statement of Findings and Purpose is misplaced. The Organized Crime Control Act as originally proposed (S. 30), contained virtually the same Statement of Findings and Purpose as above. Reference was still made to the threat of infiltration of legitimate business (findings 2 and 3), yet S. 30 did not contain a provision to fight this threat. In fact, nothing was available to stop the infiltration of business until S. 1623 and, later, S. 1861 were proposed and amended to S. 30 as Title IX. *See* note 36 *supra*. It should be noted that the statute finally enacted, S. 30 as proposed, and S. 1861 all had virtually the same Statement of Findings and Purpose. *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1, 84 Stat. 922 (1970); S. 30, 91st Cong., 1st Sess., 115 CONG. REC. 829 (1969); S. 1861, 91st Cong., 1st Sess., 115 CONG. REC. 9567 (1969).

¹²⁰ *See* note 36 *supra*.

¹²¹ S. 1623, 91st Cong., 1st Sess. § 2(a)-(c), 115 CONG. REC. 6995-96 (1969).

¹²² While introducing S. 1623, Senator Hruska stated: "This bill is aimed specifically at racketeer infiltration of legitimate business and it is premised principally upon our existing antitrust laws." 115 CONG. REC. 6993 (1969).

¹²³ Section 2(a) of S. 1623 states:

Whoever, being a person who has received any income derived directly or indirectly from any criminal activity in which such person participated as a principle . . . , applies any part of such income or the pro-

it is fair to assume "business" is synonymous with "legitimate" when viewed in context with other provisions of S. 1623.¹²⁴ This approach, which is significantly more limited than RICO's "any enterprise" approach, was categorically rejected at the Senate hearings by the Department of Justice as being too narrow.¹²⁵

Prior to the Justice Department's condemnation of S. 1623, and possibly in anticipation of the Department's objections, Senators McClellan and Hruska introduced S. 1861.¹²⁶ This bill, which eventually became RICO, opted for the broader language of "any enterprise," and in addition corrected other deficiencies of S. 1623. S. 1861 was endorsed by the Justice Department¹²⁷ and subsequently incorporated into S. 30, the Organized Crime Control Act.¹²⁸ The obvious argument to be made is that Congress chose this expansive language in order to give RICO a broader application, including illegitimate enterprises.

Even more supportive of the expansive view are Congressional actions subsequent to RICO's enactment in 1970. First, Congress has neither discussed nor attempted to amend RICO, indicating implied acquiescence in the broad interpretation given "enterprise" by the five circuits considering the question prior to *Sutton*.¹²⁹ Second, and more importantly, the Senate Judiciary Committee has twice expressly ac-

ceeds of any such income to the acquisition by or on behalf of such person of legal title to or beneficial interest in any of the assets, liabilities, or capital of any business enterprise which is engaged in, or the activities which affect, interstate or foreign commerce shall be guilty of a felony. . . .

S. 1623, 91st Cong., 1st Sess. § 2(a), 115 CONG. REC. 6995 (1969).

It is apparent that this section parallels section 1962(a) of RICO, *see* note 41 *supra*. Section 2(b) of S. 1623 applied to officers of the infiltrated business, making them guilty of a misdemeanor. Section 2(c) applied to tax fraud.

¹²⁴ Section 2(a) refers to "legal title," "beneficial interest," "assets," "capital," etc., all attributes of legitimate businesses. In addition, much attention was paid to the bill's remedies of injunction and citizens' suits, not generally applicable to criminal enterprises. S. 1623, 91st Cong., 1st Sess. § 2(a), 115 CONG. REC. 6995 (1969).

¹²⁵ First, it is too narrow in that it merely prohibits the investment of prohibited funds in a business, but fails to prohibit the control or operation of such a business by means of prohibited racketeering activities. Second, it fails to provide for forfeiture of any interest in a business acquired in violation of its prohibition. Third, it fails to include any specific provision of divestiture or dissolution, and, fourth, it does not provide for the panoply of civil investigative devices. . . .

Prepared Statement of Will Wilson, Assistant Attorney General, Department of Justice, *Senate Hearings*, *supra* note 97, at 388.

¹²⁶ *See* note 36 *supra*.

¹²⁷ *See* Report of Attorney General Richard G. Kleindienst to Subcommittee chairman John L. McClellan, *reprinted in Senate Hearings*, *supra* note 97, at ¶4.

¹²⁸ Pub. L. No. 91-452, § 1, 84 Stat. 922 (1970).

¹²⁹ *See* note 5 *supra*.

cepted the view that RICO applied to illegitimate enterprises. The first instance occurred during Senate consideration of the Criminal Code Reform Act of 1977.¹³⁰ The second and more significant instance occurred during consideration of the Criminal Code Reform Act of 1979.¹³¹ In this case, the Senate committee report noted that:

The term "enterprise" as used in 18 U.S.C. 1962 has been construed broadly to include a combination of individuals associated with various corporations . . . as well as businesses both foreign and domestic and *illegal as well as legal* The only appellate court decision to the contrary is *United States v. Sutton* . . . petition for rehearing pending. *The Committee endorses the majority view*. . . . The Committee intends that the same broad interpretations be given the term "enterprise" in this bill.¹³²

Although committee reports are not the law, these two references are significant in that they lend credence to the belief that RICO's application to illegitimate enterprises was so obvious that it was not even discussed by Congress.¹³³

In final analysis, RICO's legislative history seems as ambiguous as the statute in defining the extent of its scope. This is particularly true when recent congressional developments are considered. As a result, the courts have been free to manipulate, expand, or restrict the statute as the need arises.

¹³⁰ See SENATE COMM. ON THE JUDICIARY, REPORT ON THE CRIMINAL CODE REFORM ACT OF 1977, S. REP. NO. 605, 95th Cong., 1st Sess. 777 n.31 (1977).

The Criminal Code Reform Act of 1977 was introduced by Senators McClellan and Kennedy and was basically a recodification of Title 18 of the United States Code. See S. 1437, 95th Cong., 1st Sess., 123 CONG. REC. S6833 (daily ed. May 2, 1977). Section 1802 of S. 1437 is a recodification of RICO. *Id.* at 6838. The bill passed the Senate by a vote of 72-15. 124 CONG. REC. S860 (daily ed. Jan. 30, 1978). However, after extensive hearings in the House, the bill died in committee. "[I]t is neither essential nor desirable to enact S. 1437 (or a bill similar to it)." HOUSE COMM. ON THE JUDICIARY, REPORT ON THE RECODIFICATION OF FEDERAL CRIMINAL LAW, H. REP. NO. 29, 95th Cong., 2nd Sess. 35 (1978).

¹³¹ SENATE COMM. ON THE JUDICIARY, REPORT ON THE CRIMINAL CODE REFORM ACT OF 1979, S. REP. NO. 553, 96th Cong., 2nd Sess. 803 (1980).

¹³² *Id.* n.32 (emphasis added) (citations omitted). The movement to recodify federal criminal law was resurrected by Senator Kennedy when he introduced S. 1722 on September 7, 1979. Proposed hearings began on September 11, 1979. A companion bill, H. 6233, was introduced in the House on January 7, 1980.

¹³³ According to G. Robert Blakey (chief counsel of the Subcommittee on Criminal Laws and Procedures of the Senate during 1969 and 1970), the principal draftsman and architect of Title IX, a "group of individuals associated in fact" as used in the definition section of "enterprise" was always envisioned to include illegal associations. This inclusion was so obvious on the face of the statute that it was not pointed out in the legislative history.

Petitioner's Brief, note 37 *supra*, at 14-15 (emphasis in original).

D. Case Law

The United States Supreme Court has not dealt with RICO other than in dictum where the Court stated that the statute "seeks to prevent the *infiltration of legitimate business* operations affecting interstate commerce by individuals who have obtained investment capital from a pattern of racketeering activity."¹³⁴ The obvious reference was to RICO section 1962(a) which specifically prevents the investment of illegally received funds.¹³⁵ Although this statement probably was not meant to be the final word on the scope of RICO, it has been offered to support the restrictive view.¹³⁶

Interestingly, of the circuits that have considered the question of RICO's application to illegitimate enterprises, all but the Ninth Circuit have had at least one case appealed. Certiorari has been denied in every instance.¹³⁷

Without guidance from the Supreme Court, the lower federal courts have fashioned their own interpretations of RICO. Those upholding the statute's extension to illegitimate enterprises have generally utilized a combination of arguments already discussed.¹³⁸ Only one early district court opinion has concurred with the *Sutton* majority's result and rationale.¹³⁹ At the opposite end, another district court has held that RICO

¹³⁴ *Iannelli v. United States*, 420 U.S. 770, 787 n.19 (1975) (dictum) (emphasis added) (holding a conviction under separate counts of syndicating gambling (18 U.S.C. § 1955) and conspiracy to violate gambling laws (18 U.S.C. § 371) did not violate Wharton's Rule).

¹³⁵ See notes 41-43 *supra* and accompanying text.

¹³⁶ See 605 F.2d at 263.

¹³⁷ See cases cited in note 5 *supra*. In one case involving RICO, certiorari was dismissed. *United States v. Field*, 432 F. Supp. 55 (S.D.N.Y. 1977), *aff'd mem.*, 578 F.2d 1371 (2d Cir.), *cert. dismissed*, 439 U.S. 801 (1978). In another case the Supreme Court vacated an affirmance of a RICO conviction and required review of the concurrent sentence doctrine. *United States v. Rubin*, 559 F.2d 975 (5th Cir. 1977), *vacated and remanded*, 439 U.S. 810 (1979), *aff'd in part, rev'd in part*, 591 F.2d 278 (5th Cir. 1979).

¹³⁸ See note 48 *supra* and accompanying text.

¹³⁹ *United States v. Moeller*, 402 F. Supp. 49 (D. Conn. 1975), *overruled by United States v. Altese*, 542 F.2d 104 (2d Cir. 1976), *cert. denied sub nom.*, *Napoli v. United States*, 429 U.S. 1039 (1977). In *Moeller*, the defendant was majority stockholder in a corporation that owned a subsidiary, the Sponge Rubber Products Co. The defendant was accused of setting fire to a sponge rubber plant in order to collect on an insurance policy with a face value of \$51,578,000. The indictment charged the defendant and others with "constituting and being associated with an enterprise engaged in, and the activities of which affected interstate commerce . . . to wit: a group of individuals associated in fact for the purpose of burning and destroying buildings. . . ." 402 F. Supp. at 57. The trial court held that RICO only applied to legitimate enterprises and since burning buildings is not legitimate, the court dismissed the RICO count.

applies *only* to organized crime, and *not* legitimate business.¹⁴⁰ An area where RICO has been successfully employed repeatedly is in the prosecution of corrupt public officials engaging in influence peddling schemes.¹⁴¹ The office overseen by the official is generally considered the "enterprise."¹⁴² Foreign corporations¹⁴³ and union officials¹⁴⁴ have also been targets.

RICO's constitutionality has been attacked on several grounds: vagueness,¹⁴⁵ violation of the prohibition against *ex post facto* laws,¹⁴⁶

¹⁴⁰ *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109 (S.D.N.Y. 1975). Dr. Barr was a customer of WUI/TAS, a telephone answering service operating in 50 states with yearly revenues equalling \$17,000,000. Barr alleged that WUI/TAS fixed prices and charged for messages not received in violation of RICO. Filing an amended complaint under 18 U.S.C. § 1964, Barr sought treble damages, costs, and legal fees. The trial court held that RICO was not designed for this type of case, but only applied to organized crime due to references to the Mafia, *La Cosa Nostra*, racketeers, and the like in the legislative history. Even assuming the plaintiff's allegations were true and the defendant's acts were illegal, the court reasoned that to allow filing under RICO would prejudice the defendant by inferring a connection with organized crime. *Id.* at 113.

¹⁴¹ Courts within the Third Circuit have had the most experience with RICO's use against corrupt public officials. *See United States v. Davis*, 576 F.2d 1065 (3d Cir. 1978) (bribes accepted by a prison warden); *United States v. Vignola*, 464 F. Supp. 1091 (E.D. Pa. 1979) (kick-backs to a traffic court judge); *United States v. Fineman*, 434 F. Supp. 189 (E.D. Pa. 1977), *aff'd*, 571 F.2d 572 (3d Cir.), *cert. denied*, 436 U.S. 947 (1978) (Speaker of Pennsylvania House of Representatives "sold" admissions to the state's professional schools); *United States v. Forsythe*, 429 F. Supp. 715 (W.D. Pa. 1977), *rev'd*, 560 F.2d 1127 (3d Cir. 1977) (kick-backs to judges and constables operating a bail bond referral service); *United States v. Frumento*, 426 F. Supp. 797 (E.D. Pa. 1976), *aff'd*, 563 F.2d 1083 (3d Cir. 1977), *cert. denied sub nom.*, *Millhouse v. United States*, 434 U.S. 1072 (1978) (bribes accepted by Pennsylvania Bureau of Cigarette and Beverage Tax officials). For cases involving members of local police departments, see *United States v. Grzywacz*, 603 F.2d 682 (7th Cir. 1979); *United States v. Brown*, 555 F.2d 407 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978).

¹⁴² *But see United States v. Mandel*, 415 F. Supp. 997 (D. Md. 1976).

¹⁴³ *United States v. Parness*, 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).

¹⁴⁴ *United States v. Rubin*, 559 F.2d 975 (5th Cir. 1977), *vacated and remanded*, 439 U.S. 810 (1978), *aff'd in part, rev'd in part*, 591 F.2d 278 (1979); *United States v. Kaye*, 556 F.2d 855 (7th Cir. 1977), *cert. denied*, 434 U.S. 921 (1978); *United States v. Field*, 432 F. Supp. 55, (S.D.N.Y. 1977), *aff'd mem.*, 578 F.2d 1371 (2d Cir.), *cert. dismissed*, 439 U.S. 801 (1978).

¹⁴⁵ *See United States v. Herman*, 589 F.2d 1191 (3d Cir. 1978); *United States v. Hawes*, 529 F.2d 472 (5th Cir. 1976); *United States v. Campanale*, 518 F.2d 352 (9th Cir. 1975), *cert. denied sub nom.*, *Grancich v. United States*, 423 U.S. 1050 (1976); *United States v. Cappetto*, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); *United States v. Stofsky*, 409 F. Supp. 609 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976).

¹⁴⁶ U.S. CONST. art. I, § 9, cl. 3; *See United States v. Campanale*, 518 F.2d 352 (9th Cir. 1975), *cert. denied sub nom.*, *Grancich v. United States*, 423 U.S. 1050 (1976); *United States v. Field*, 432 F. Supp. 55 (S.D.N.Y. 1977), *aff'd mem.*, 578

violation of the double jeopardy clause,¹⁴⁷ denial of equal protection,¹⁴⁸ and subjection of defendants to cruel and unusual punishment.¹⁴⁹ Each time, however, the statute has been upheld.

To summarize, RICO's intended scope has never been spelled out, neither in the statute nor during the legislative process. As a result, the courts have been free to improvise. Their fear of creating a technical loophole in the statute's scope, such as allowing criminals to plead that their "enterprise" is wholly illegal, and thereby not covered by RICO, has forced most courts to accept the expansive view. However, their reliance on somewhat superficial arguments to rationalize this expansion, such as the statute's broad statement of purpose¹⁵⁰ and the isolated term "any enterprise,"¹⁵¹ has left an unsettling feeling, especially in light of the comprehensive and logically appealing "black letter law" analysis offered by the *Sutton* majority.

The net effect of the expansive approach is that it allows increasing accumulation of prosecutorial discretion by not strictly delineating the parameters of the statute. As a result, there is a very real threat that this increased discretion will lead to abuse, *e.g.* applying RICO to a bandit who robs two banks.¹⁵² The balancing of the need to keep the statute free of loopholes and therefore viable as a weapon against organized crime, against the increased potential for abuse, is a problem which has and will continue to plague the courts if they continue on their expansionist path, especially if they do not define the statute's boundaries.

III. ABUSE OF RICO

A. *The Problem*

Thus far, the emphasis of this note has been on the two judicial views of RICO's scope and the reasoning supporting each position. The ramifications of the *Sutton* court's restrictive holding, however, clearly go beyond the reversal of ten racketeering convictions. It manifests the apprehension among some members of the judiciary that RICO's potential for abuse is so great that they are willing to limit the statute almost to the point of rendering it nugatory. The question is whether this apprehension is justified.

F.2d 1371 (2d Cir.), *cert. dismissed*, 439 U.S. 801 (1978); *United States v. Mandel*, 415 F. Supp. 997 (D. Md. 1976).

¹⁴⁷ U.S. CONST. amend. V; *see United States v. Frumento*, 563 F.2d 1083 (3d Cir. 1977), *cert. denied sub. nom.*, *Millhouse v. United States*, 424 U.S. 1072 (1978); *United States v. Stofsky*, 409 F. Supp. 609 (S.D.N.Y. 1973), *aff'd* 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976).

¹⁴⁸ *See United States v. Aleman*, 609 F.2d 298 (7th Cir. 1979).

¹⁴⁹ U.S. CONST. amend. VIII; *see*, 609 F.2d at 306.

¹⁵⁰ *See* notes 112-119 *supra* and accompanying text.

¹⁵¹ *See* notes 71-74 *supra* and accompanying text.

¹⁵² *See* 605 F.2d at 266; note 91 *supra* and accompanying text.

Since the enactment of RICO, there has been fear among some that the statute's "grant of virtually unlimited investigative powers to the government creates a serious danger that the government's understandable zeal in the pursuit of organized crime may result in a pervasive undermining of important civil liberties, an erosion that would inure to the detriment of us all."¹⁵³

Although this statement may seem exceedingly pessimistic, it stems from some obvious technical difficulties within the statute. For instance, RICO is not limited to members of organized crime, *i.e.*, the "Mafia." "[T]he title makes no discrete segregation of mobsters. It is a tool to be employed for all."¹⁵⁴ The obvious reason for eschewing this limitation is that Congress was trying to avoid the problems associated with status crimes.¹⁵⁵ Another reason is that no one can agree on a suitable definition of "Organized Crime,"¹⁵⁶ therefore, the "crime" is defined in terms of composite underlying crimes and attributes associated with organized criminal activity.¹⁵⁷ Although these attributes are characteristic of "mobsters," they are not limited to them.¹⁵⁸ When it was suggested that being a member of "organized crime" be made an element of the offense, the suggestion was soundly rejected.¹⁵⁹ From the beginning, then, it was understood that RICO would apply to everyone.

¹⁵³ 116 CONG. REC. 855 (1970) (remarks of the ACLU introduced by Sen. Young).

¹⁵⁴ Dissenting views of Rep. Conyers, Mikva and Ryan, HOUSE REPORT, *supra* note 100, at 187.

¹⁵⁵ See *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1971).

¹⁵⁶ Dissenting views of Rep. Conyers Mikva and Ryan, HOUSE REPORT, *supra* note 100, at 196. Concluding their criticism of the Organized Crime Control Act the dissenters stated:

[E]ven in its draftsmanship it would rather equivocate than fight. Thus one searches in vain for a definition of "organized crime." In a criminal statute where the term "organized crime" is an operative device, it is not defined. When asked about the omission, the drafters explained that it was impossible to define, but everybody knew what it was.

Id.

¹⁵⁷ See 18 U.S.C. §§ 1961(1), (5) (1976), *discussed at notes 58-59 supra*; SENATE REPORT, *supra* note 98, at 34.

¹⁵⁸ *United States v. Campanale*, 518 F.2d 352, 363 (9th Cir. 1975), *cert. denied sub nom.*, *Grancich v. United States*, 423 U.S. 1050 (1976).

¹⁵⁹ 116 CONG. REC. 35342 (1970). Representative Biaggi proposed an amendment to Title IX, now section 1962, that: "It shall be unlawful for any person to be a member of a Mafia or *La Cosa Nostra* organization." "Mafia" and "*La Cosa Nostra*" were defined to "mean nationally organized criminal groups composed of persons of Italian ancestry forming an underworld government ruled by a form of board of directors, who direct or conduct a pattern of racketeering and control the national operation of a criminal enterprise in furtherance of a monopolistic trade restraining criminal conspiracy." Violation of the proposed amendment would have resulted in a \$5,000 fine and/or five years in prison. The amendment was defeated by voice vote. 116 CONG. REC. 35346 (1970). The Criminal Code Reform Act of 1979 also has a provision directed against operating a racketeering

Some questioned if RICO would be effective against its target, the "Mafia."¹⁶⁰ Section 1961(5) requires at least *two* acts of racketeering activity to establish a pattern.¹⁶¹ The traditional problem in prosecuting organized crime, however, is the inability to secure even one conviction.¹⁶² If the government could prove the underlying act as proscribed by section 1961(1), there would be little need for the statute.¹⁶³

Both courts and commentators have recognized that RICO's broad application to illegitimate enterprises can potentially circumvent other provisions in the Organized Crime Control Act.¹⁶⁴ The most notable example is Title VIII which deals with syndicated gambling.¹⁶⁵ Title VIII requires a minimum involvement of five people¹⁶⁶ in a gambling operation which either exists for a period in excess of thirty days or has a gross revenue of \$2,000 in a single day.¹⁶⁷ Violation of this section subjects one to a fine not greater than \$20,000 and/or a maximum five years in prison.¹⁶⁸ RICO, on the other hand, does not require a minimum

syndicate: "A person is guilty of an offense if he organizes, owns, controls, manages, directs, finances, or otherwise participates in a supervisory capacity in a racketeering syndicate." S. 1722, 96th Cong., 1st Sess., § 1801(a) (1979).

¹⁶⁰ See note 156 *supra*; N.Y.C. Bar Assoc. Comm. on Fed. Legislation, *House Hearings*, *supra* note 99, at 327.

¹⁶¹ As originally proposed in S. 1861, "pattern of racketeering activity" was defined as "at least one act occurring after the effective date of this chapter." S. 1861, § 1961(6), 91st Cong., 1st Sess., 115 CONG. REC. 9567 (1969). The Justice Department noted that "[t]he term 'pattern' indicates what is intended to be proscribed is not a single, isolated act of 'racketeering activity,' but at least two such acts." Kleindienst Report, *supra* note 127, at 405. S. 1861 was subsequently amended to require two acts. See 18 U.S.C. § 1961(5) (1976), *reprinted at* note 58 *supra*.

¹⁶² Dissenting views of Representatives Conyers, Mikva and Ryan, HOUSE REPORT, *supra* note 100, at 186; N.Y.C. Bar Assoc. on Fed. Legislation, *House Hearings*, *supra* note 99, at 329.

It should be pointed out that both acts of racketeering must be proven beyond a reasonable doubt to sustain a conviction under RICO. See *generally*, *In re Winship*, 397 U.S. 358 (1969). In addition, the "acts must have been connected with each other by some common scheme, plan, or motive so as to constitute a pattern and not simply a series of disconnected acts." *United States v. Stofsky*, 409 F. Supp. at 614. This connection must also be proven beyond a reasonable doubt. *United States v. Kaye*, 556 F.2d 855, 860 (7th Cir.), *cert. denied*, 434 U.S. 921 (1977).

¹⁶³ Dissenting views of Representatives Conyers, Mikva, and Ryan, HOUSE REPORT, *supra* note 100 at 186.

¹⁶⁴ See *United States v. Altese*, 542 F.2d at 109 (Van Graafeiland, J., dissenting); *United States v. Castellano*, 416 F. Supp. 125, 131 (E.D.N.Y. 1975). See also *Atkinson*, *supra* note 24, at 6; Note, *supra* note 50, at 120.

¹⁶⁵ Title VIII was codified at 18 U.S.C. § 1955 (1976).

¹⁶⁶ 18 U.S.C. § 1955(b)(1)(ii) (1976).

¹⁶⁷ *Id.* § 1955(b)(1)(iii).

¹⁶⁸ *Id.* § 1955(a).

number of persons, nor is there a limitation placed on revenues or duration. All that is required are two acts of gambling indictable under applicable state law and punishable for at least one year,¹⁶⁹ along with some affect on interstate commerce.¹⁷⁰ Under this view, it is quite feasible that "the 'Mom and Pop' variety of illegal gambling business"¹⁷¹ would be within RICO's scope. In addition, a conviction under RICO exposes a defendant to more severe penalties, a fine of not more than \$25,000 and/or a maximum twenty years in prison.¹⁷² This increased severity of potential penalties is also a concern for those involved in a RICO conspiracy.¹⁷³

As the use of RICO has increased,¹⁷⁴ courts seem to have become more aware of its potential for abuse. Although the *Sutton* court was the first circuit court to severely restrain the statute's application, other judges, through dissenting opinions, have expressed dissatisfaction in the expansive interpretation that prevailed in their circuits.¹⁷⁵ In fact, prior to

¹⁶⁹ *Id.* § 1961(1)(A).

¹⁷⁰ *Id.* § 1962(c), reprinted at note 12 *supra*. Under 18 U.S.C. § 1955, convictions do not require proof of effect on interstate commerce. It is presumed that those operations within the statutory requirements sufficiently affect commerce. See *United States v. Manson*, 494 F.2d 804 (7th Cir. 1974), cert. denied, 419 U.S. 994 (1975); *Schneider v. United States*, 459 F.2d 540 (8th Cir.), cert. denied, 409 U.S. 877 (1972).

¹⁷¹ N.Y.C. Bar Assoc. Comm. on Fed. Legislation, *House Hearings*, *supra* note 99 at 329.

¹⁷² 18 U.S.C. § 1963(a) (1976).

¹⁷³ As noted, conspiracy under RICO is governed by section 1962(d), not the general conspiracy statute, 18 U.S.C. § 371. See note 50 *supra*. The disparity of penalties becomes immediately evident. RICO section 1962(d) carries the same penalties as the other RICO provisions—\$25,000 and/or twenty years imprisonment. Section 371, however, only imposes a maximum \$10,000 fine and/or five years in prison. 18 U.S.C. § 371(a) (1976). In addition, for example, the *Sutton* defendants could have been charged with operating a "continuing criminal enterprise" relating to their drug dealings. See 21 U.S.C. § 848 (1976). Had this been done, the same severe penalties could have been imposed without reliance on RICO. See *id.* § 848(a)(1).

¹⁷⁴ One defendant has characterized the increased use of RICO as "faddish." *United States v. Nerone*, 563 F.2d 836, 852 (7th Cir. 1977), cert. denied, 435 U.S. 951 (1978).

¹⁷⁵ Judge Van Graafeiland was the first judge in a reported opinion to object to RICO's use against illegitimate enterprises. *United States v. Altese*, 542 F.2d at 107 (Van Graafeiland, J., dissenting). In 1979, there were dissents in every reported circuit opinion involving the scope of "enterprise" with the exception of *United States v. Huber*, 603 F.2d 387 (2d Cir. 1979), where a strong warning was given, see note 176 *infra* and accompanying text. For dissents see *United States v. Aleman*, 609 F.2d 298, 311 (7th Cir. 1979) (Swygert, J., dissenting) (citing *Sutton*); *United States v. Diecidue*, 603 F.2d 535, 566 (5th Cir. 1979) (Godbold, J., dissenting); *United States v. Grzywacz*, 603 F.2d 682, 690 (7th Cir. 1979) (Swygert, J., dissenting); *United States v. Rone*, 598 F.2d 564, 573 (9th Cir. 1979) (Ely, J., dissenting).

Sutton the Second Circuit had sternly warned that, "we caution against undue prosecutorial zeal in invoking RICO. We also emphasize to district judges that when RICO is invoked each set of facts must be evaluated independently. We cannot at this point lay down any fixed rules concerning the applicability of the statute."¹⁷⁶ One can only speculate whether rules will be forthcoming.

Since *Sutton*, the Seventh Circuit has again considered RICO's application to "illegitimate enterprises." In *United States v. Aleman*,¹⁷⁷ the court affirmed its prior holding¹⁷⁸ that RICO extends to illegal enterprises. However, in a biting dissent, Judge Swygert stated, "to maintain, as the majority does, that the pattern of criminal activity engaged in by Aleman and his associates [robbing homes] is an 'enterprise' within the meaning of the statute is to turn logic on its head."¹⁷⁹ This recognition and apparent dissatisfaction with the all-inclusive scope of RICO seems to explain at least one factor motivating the *Sutton* majority to adopt its narrow interpretation.

Another justifiable concern of the *Sutton* majority is RICO's incursion into state criminal law enforcement.¹⁸⁰ The two predicate acts which constitute a "pattern of racketeering activity" can be accomplished through committing any one of eight state felonies twice,¹⁸¹ thus, a state offense which would typically be prosecuted by state authorities now becomes a federal offense. For example, two robberies of a convenience food store by two individuals would subject them to RICO's penalties under the government's expansive view since the "enterprise" would consist of, to paraphrase the statute, "a group of two individuals associated in fact for the purpose of robbing convenience food stores," assuming an affect on interstate commerce.

Although the fact pattern in *Sutton* reveals a much more serious and sophisticated enterprise than robbing convenience food stores, and it would be easier to justify the majority's restrictive holding had the

¹⁷⁶ *United States v. Huber*, 603 F.2d 387, 396 (2d Cir. 1979).

¹⁷⁷ 609 F.2d 298 (7th Cir. 1979).

¹⁷⁸ *United States v. Cappetto*, 502 F.2d 1351 (7th Cir. 1974) *cert. denied*, 420 U.S. 925 (1975).

¹⁷⁹ 609 F.2d at 311 (Swygert, J., dissenting).

¹⁸⁰ 605 F.2d at 270. *See United States v. Moeller*, 402 F. Supp. 49, 59 (D. Conn. 1975); Atkinson, *supra* note 24, at 6; 116 CONG. REC. 35205 (1970) (remarks of Rep. Mikva) ("What we have done in one fell swoop—and the States-righters who may be in this room should listen—is to incorporate as a part of the Federal law all of the offenses which heretofore have traditionally been treated as under State and local jurisdictions.").

¹⁸¹ 18 U.S.C. § 1961(1)(A) (1976) provides: "'Racketeering activity' means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year"

statute been applied to a flagrantly abusive situation, the fact remains that the *Sutton* majority was aware of RICO's potential for abuse.

B. Specific Examples

Although it should not be concluded that abuse of RICO is the rule rather than the exception, isolated instances of abuse have arisen in the reported cases.¹⁸²

In *United States v. Morris*,¹⁸³ the defendant and two accomplices planned and participated in a series of rigged card games in hotel suites located in Las Vegas and Lake Tahoe, Nevada. Over a period of nineteen months the three recruited unsuspecting card players, "marks" in the jargon of the trade, invited them to the suite for a friendly game of cards, and then defrauded the victims through sleight-of-hand tricks which guaranteed the winning hand to one of the three confederates.¹⁸⁴ The winnings were then split three ways. The evidence indicated Morris made regular trips from his home in Texas to Nevada where the games took place. He was indicted for conducting an "enterprise" described as "a group of individuals associated in fact to defraud in illegal card games persons who had travelled to the State of Nevada."¹⁸⁵ The defendant asserted, *inter alia*, that gambling is legal in Nevada, hence the two requisite racketeering acts were not proven.¹⁸⁶ The court rejected this argument noting that dishonest gambling is illegal in Nevada as in every other state.¹⁸⁷ Following *United States v. Hawes*,¹⁸⁸ the Fifth Circuit held that RICO extends to illegitimate enterprises and affirmed Morris's conviction. From the facts given, the operation Morris was conducting seems little more than a group of confidence men plying their trade. It hardly represents traditional notions of infiltration of legitimate business by "racketeers." In fact, the federal law prohibiting

¹⁸² All of the cases within this section involve section 1962(c) and an attack on the "enterprise" element of the offense.

¹⁸³ 532 F.2d 436 (5th Cir. 1976).

¹⁸⁴ Five "marks" testified that on various occasions they were dealt full houses only to be beaten by four-of-a-kind. One "mark" was dealt four jacks but was beaten by four kings. Another was dealt a queen high flush but was beaten by a king high flush. *Id.*, at 438.

¹⁸⁵ 532 F.2d at 442.

¹⁸⁶ Morris was also charged with five counts of interstate travel with the intent to defraud through illegal gambling activity under 18 U.S.C. § 1952(a)(3). He could have been charged under a Nevada law which prohibits use of sleight-of-hand tricks to defraud which carries a penalty of one to ten years in prison and/or a maximum \$5,000 fine. NEV. REV. STAT. § 465.070 (1978). See requisite state offenses, 18 U.S.C. § 1961(1), *supra* note 181.

¹⁸⁷ 531 F.2d at 442.

¹⁸⁸ 529 F.2d 472 (5th Cir. 1976).

syndicated gambling would not apply since only three people were involved.¹⁸⁹

In *United States v. Swiderski*,¹⁹⁰ the two defendants were indicted for the sale of cocaine which occasionally took place at Sylvester's Restaurant, owned by defendant Swiderski. Most of the evidence stemmed from the sale of three ounces of cocaine on November 10, 1976, to five different people at three different sites, one being Sylvester's.¹⁹¹ A second sale of one gram of cocaine was consummated one month later with the sister of one of Swiderski's restaurant employees; this sale took place in a second floor room of the building which housed the restaurant. A third sale was made to an undercover agent at Sylvester's on January 6, 1977.¹⁹² Swiderski was charged with violating RICO section 1962(c), the enterprise being Sylvester's which "was not only engaged in the food business, but also being used as a cover or front for the illegal trafficking of cocaine."¹⁹³ The D.C. Circuit affirmed the convictions, citing *United States v. Altese*¹⁹⁴ for the proposition that the illegitimate as well as legitimate aspects of Sylvester's were covered by the statute.

The problem with the court's reasoning is that it sees Sylvester's as the connection with legitimate business necessary to rationalize the application of RICO. However, the enterprise at issue here is the illicit sale of cocaine. There is little evidence of any connection between the business of selling cocaine and the business of selling food. There is no evidence that the monies derived from the drug sales were invested in Sylvester's, thereby justifying indictment under section 1962(a).¹⁹⁵ With the exception of McGowan, a co-defendant, and Logay, the undercover agent, both of whom frequented the restaurant, there is no evidence that sales were made to other restaurant customers, nor was there

¹⁸⁹ See notes 165-68 *supra* and accompanying text.

¹⁹⁰ 593 F.2d 1246 (D.C. Cir. 1978).

¹⁹¹ On November 10, 1976, Swiderski met two couriers who were transporting cocaine from New York to Washington. He inspected four, one-ounce packages on the third floor of the restaurant building where he kept his business records. Later, all three left with co-defendant McGowan and went to the house of a prospective buyer where McGowan purchased 1/2 an ounce and the buyer also purchased 1/2 an ounce. The four then drove to a health spa in Virginia where two employees purchased one ounce. Upon their return to Sylvester's, one of the restaurant employees also purchased an ounce. *Id.* at 1247-48.

¹⁹² The agent allegedly worked undercover during the entire period, yet only the three instances of sales are reported. Another cocaine dealer allegedly delivered cocaine to Swiderski twice a week for a period of about one year, but his testimony is not expanded upon in the opinion. *Id.* at 1248.

¹⁹³ *Id.*

¹⁹⁴ 542 F.2d 104 (2d Cir. 1976), *cert. denied sub. nom.*, *Napoli v. United States*, 429 U.S. 1039 (1977).

¹⁹⁵ See notes 41-43 *supra* and accompanying text.

evidence that Swiderski attempted to procure potential drug buyers from his restaurant clientele.¹⁹⁶ In addition, not all of the drug sales were made at Sylvester's. The only reason the restaurant proved to be a suitable location for some deals was because Swiderski happened to be there.

Accepting the *Swiderski* court's reasoning leads to the conclusion that anytime two underlying offenses are committed on the premises of a business engaged in interstate commerce, RICO can be invoked. If this were true, the jewelry store owned by Adams in the *Sutton* case constituted the requisite "enterprise."¹⁹⁷ In addition, the sale of about four ounces of cocaine to seven different people over three months can hardly be characterized as syndicate infiltration of the retail drug business.

The third and possibly most disturbing misuse of RICO sanctioned by a court is shown by *United States v. Aleman*.¹⁹⁸ In *Aleman*, the defendants were convicted of operating an "illegitimate enterprise" whose sole purpose was to rob homes, then "fence" the stolen goods to turn a profit.¹⁹⁹ Only three robberies were actually committed over a period of about one year. The first robbery occurred on September 16, 1972, following a meeting between Aleman, Foresta, Almeida,²⁰⁰ and two others at a Chicago bar, the Survivor's Club. It was believed by the defendants that a large amount of cash was in the targeted home. Foresta and Almeida were selected to actually conduct the break-in. Aleman provided the keys to a stolen car plus the address of the home. During the robbery, Foresta threatened the owner with a gun, then tied her up along with a fourteen-year-old babysitter. After thirty minutes of ransacking the rooms, the robbers left with some cash and jewelry. They returned to the club where Aleman paid them \$500 each for their burglary services.

The second robbery did not occur until January, 1973, again following a meeting at the Club. It was believed that a doctor in Indianapolis kept a large sum of money in his home. Foresta and Almeida were once more selected to conduct the robbery. Aleman provided the two with the address plus a sheriff's badge to be used as a ruse to gain entry. At the doctor's home, the two used the badge to push their way past the maid

¹⁹⁶ If in fact the restaurant had been closely related with the illegal drug operation, why did the government not require forfeiture of Sylvester's under RICO section 1963(a)(2)? The opinion only indicates that the defendants received substantial jail terms. 593 F.2d at 1247.

¹⁹⁷ See note 23 *supra* (assuming the jewelry store was engaged in interstate commerce).

¹⁹⁸ 609 F.2d 298 (7th Cir. 1979).

¹⁹⁹ *Id.* at 302.

²⁰⁰ Almeida was an unindicted co-conspirator and his testimony was used to supplement the testimony of the victims. The defendants did not testify in their own behalf and their defense consisted mainly of efforts to impeach Almeida and discredit eyewitness identification. *Id.*

who was the only person present. She was threatened with a gun and then tied up. The two robbers searched the home for about an hour before leaving with \$35,000 in cash, jewelry and furs. Using the maid's car in the get-away, the two joined up with some of Aleman's friends. All four then returned to Aleman's Chicago home. Foresta and Almeida were again paid \$500 each for their services.²⁰¹

The third robbery occurred in November, 1973, after a similar pre-robbery planning session. This last target home was in Chicago and the objects sought were gold coins. This time, however, Aleman and another man joined Foresta and Almeida in committing the robbery. The four again used the sheriff's badge to gain entry and then struck the owner over the head with a gun. They then tied up the owner and his wife. After searching for one hour, the thieves left with various items worth \$6,500, but the gold coins were not discovered. Aleman and Foresta were indicted under section 1962(c), conspiracy,²⁰² transporting stolen goods, and various firearms offenses. Upon conviction, Aleman and Foresta each received thirty year prison terms.²⁰³

The disturbing point is not that the defendants were convicted or that they received stiff prison terms, rather it is the use of RICO against two ordinary bandits who committed three robberies in over one year. The case is devoid of any element of infiltration of a legitimate business, and the defendants can hardly be characterized as members of "organized crime." The court justifies the application of RICO by stating that "[p]erhaps given more time, their business would have successfully grown into a conglomerate at the expense of their victims, but fortunately for the public the defendants were put out of business."²⁰⁴ However, this statement holds true for any conspiracy. Clearly, this alone cannot justify the use of RICO, with its extraordinary penalties, as a substitute for traditional state criminal law. This case is a realization of the fears expressed by the *Sutton* majority. Its facts almost directly parallel the *Sutton* majority's extreme example of abuse involving the two bank robberies.²⁰⁵

Although the three previous cases illustrate the courts' acquiescence in prosecutorial abuse of RICO, this again seems to be the exception rather than the rule. For example, a cautious district court in *United*

²⁰¹ One of Aleman's two friends, Miroff, attempted to "fence" the stolen goods but the customer was a federal undercover narcotics agent. As a result, most of the goods and cash were recovered in a search of the home where they were stored. *Id.*

²⁰² See, note 50 *supra*.

²⁰³ 609 F.2d at 301 n.3 and 4. The government allegedly filed a petition for Dangerous Special Offender Sentencing pursuant to 18 U.S.C. § 3575 and offered to prove that Aleman had participated in five murders. The petition was apparently denied though the trial court did consider the issue. *Id.* at 311 n.18.

²⁰⁴ *Id.* at 305.

²⁰⁵ 605 F.2d at 266.

*States v. Moeller*²⁰⁶ dismissed a RICO count which alleged that the defendants conducted an enterprise "as a group of individuals associated in fact for the purpose of burning and destroying buildings."²⁰⁷ Throughout the existence of the "enterprise" only one building was burned. The other racketeering act was the kidnapping of three plant employees during the arson offense.²⁰⁸ Significantly, both the arson and kidnapping offenses were state crimes.²⁰⁹ In response, the court while commenting on RICO's supplanting of state criminal law stated, "Congress may have the power to extend federal criminal jurisdiction that far into areas normally handled by the states, but it should take clear indication of legislative intention before such a sweeping purpose is attributed to it."²¹⁰

Similarly, in *United States v. Dennis*,²¹¹ a RICO count was dismissed where the defendant allegedly conducted the affairs of an "enterprise" through the collection of unlawful debts. The defendant was an employee of General Motors Assembly Division and had allegedly lent money to co-workers at usurious interest rates. The alleged "enterprise" affecting interstate commerce was General Motors. Obviously, there was no nexus between the defendant's loansharking activities and the activities of General Motors. As a result, the RICO count was properly dismissed.²¹²

All of these cases indicate that RICO has occasionally been used in an arguably repressive manner against individual defendants. Whether this can be beneficial is not considered here. These cases are merely offered to illustrate RICO's potential for abuse stemming from its ambiguous language and its uncertain court-defined parameters.

C. Solutions

The difficulty in assessing the value of RICO's application to illegitimate enterprises is that there are beneficial as well as deleterious aspects to be weighed. Anyone familiar with the *Sutton* "enterprise"²¹³

²⁰⁶ 402 F. Supp. 49 (D. Conn. 1975).

²⁰⁷ *Id.* at 57.

²⁰⁸ See note 181 *supra*.

²⁰⁹ 402 F. Supp. at 57.

²¹⁰ *Id.* at 59.

²¹¹ 458 F. Supp. 197 (E.D. Mo. 1978).

²¹² See *United States v. Nerone*, 563 F.2d 836 (7th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978). This same reasoning was used by the Seventh Circuit in reversing a RICO conviction where the defendants operated a gambling casino in the basement of a recreation hall of a mobile home park. The court concluded that "[t]he Government's case must fail because a total want of proof of the connection between the racketeering activities and the affairs of Maple Manor, Inc. Geographical juxtaposition of the enterprises is insufficient." *Id.* at 852.

²¹³ 605 F.2d, at 263; see notes 12-20 *supra* and accompanying text.

has the "gut-feeling" that the defendants should be jailed, yet the same individuals may view the court's stance in *Aleman*²¹⁴ as repressive. This ambivalence results in two lines of decisions. In cases like *Altese*²¹⁵ and *Rone*,²¹⁶ the courts simplistically and unequivocally state that the statute was designed to include illegal enterprises. The other line, represented by *Sutton*, states the opposite finding that illegal enterprises are not within the statute's scope, citing the legislative history as support. The first line's expansionist view can result in abuse, while the second line's restrictive view can result in a nugatory statute.

It has been shown that the statute is pregnant with potential for abuse. Any federal prosecutor, so inclined, can adapt the statute to virtually any fact pattern. Actually, this is not surprising since the statute's application was designed to be flexible.

One solution to cure this over-breadth and assure that RICO is not applied in a repressive manner is to rewrite it. By strictly delineating the statute's scope, the courts are relieved of the burden of justifying the application of RICO to illegitimate "enterprises," a justification that frequently relies on superficial arguments to achieve a desirable result.²¹⁷ This solution also prevents courts from being forced to take "maverick" positions, like the *Sutton* majority, when confronted with these shallow assertions. One commentator has suggested limiting the statute's scope to financial crimes over \$100,000 or felonies involving personal injury.²¹⁸ The problem with narrowing the statute is that it makes the case against the announced target, organized crime, more difficult.

Another possible solution is to limit the statute's application solely to organized crime figures. Although it is questionable whether membership in organized crime can be a statutory element and still pass constitutional muster,²¹⁹ like obscenity it is arguable that the courts and the Justice Department will know organized crime when they see it.²²⁰ If a preliminary hearing were held to determine whether the defendant should be charged under RICO, the defendant's rights could be effectively protected from prosecutorial abuse.

Certainly there are other solutions which can be offered, but with all things considered, the best solution in limiting RICO's abusive nature is the one already theoretically employed.²²¹ Presently, the federal pro-

²¹⁴ 609 F.2d 298 (7th Cir. 1979); see notes 197-204 *supra* and accompanying text.

²¹⁵ 542 F.2d 104 (2d Cir. 1976), *cert. denied sub nom.*, *Napoli v. United States*, 429 U.S. 1039 (1977).

²¹⁶ 598 F.2d 564 (9th Cir. 1979).

²¹⁷ *Id.*

²¹⁸ See Atkinson, *supra* note 24, at 18.

²¹⁹ See notes 155-59 *supra*.

²²⁰ See note 156 *supra*.

²²¹ See Note, *The Strike Force: Organized Law Enforcement v. Organized Crime*, 6 COLUM. J.L. & SOC. PROB. 496, 507 (1970).

secutor has primary responsibility in assuring the non-abusive application of RICO. Each Strike Force should be equipped with detailed rules and guidelines to determine in which instances RICO should be invoked. A centralized committee within the Justice Department should review all indictments paying particular attention to the federal-state balance. Also, investigative agencies should integrate efforts with the Justice Department to assure maximum allocation of resources. Thus, federal investigative efforts will not be wasted on cases where a RICO indictment will not ensue because state prosecution is preferred. Most of these internal review procedures are already in operation, either formally or informally,²²² but much still depends on the good faith of the prosecutor.

When the prosecutor's zeal replaces his better judgment, the courts assume the responsibility of checking abusive use of the statute and placing the system back in perspective. This supervisory role of the courts explains the *Sutton* holding. Surely, the *Sutton* majority knew of the expansionist trend currently in vogue when it held contrary to five other circuits. Although the case, at least superficially, seems to lack an abusive character, it is significant in that it points up the power courts generally wield in controlling prosecutorial discretion. As a specific deterrent, it puts zealous prosecutors on notice that their case may be thrown out when intentional abuse occurs; as a general deterrent, it reminds everyone that parameters exist even though they are unarticulated. It is open to speculation why the majority did not articulate these parameters, as suggested by the Second Circuit.²²³ Perhaps the Sixth Circuit felt that this task would best be accomplished by the Supreme Court, and by holding contrary to all other circuits, the questions of RICO's scope could be forced upon the Court for speedy resolution just as the Sixth Circuit had forced clarification of the Hobbs Act.²²⁴

²²² See *In re Subpoena of Perisco*, 522 F.2d 41 (2d Cir. 1975). See also Note, *supra* note 28.

²²³ See *United States v. Huber*, 603 F.2d 387, 396 (2d Cir. 1979). See also notes 172-73 *supra* and accompanying text.

²²⁴ The *Sutton* dissent analogizes the majority's limitation of "enterprise" to the Sixth Circuit's limiting of the Hobbs Act, 18 U.S.C. § 1951 (1976). In *United States v. Yokley*, 542 F.2d 300 (6th Cir. 1976), two defendants broke into the home of the manager of a Detroit K-Mart store. One defendant held the manager's family hostage while the other accompanied the manager to the store where the safe was emptied. Since the store was engaged in interstate commerce, the defendants were charged with violent interference with commerce under 18 U.S.C. § 1951, commonly referred to as the Hobbs Act or the anti-racketeering statute. The district court dismissed the racketeering counts of the indictment holding that the Hobbs Act applied only to corrupt labor practices. The Sixth Circuit affirmed even though it held the Hobbs Act was not limited to labor activities. In reasoning which parallels *Sutton*, the court held that the Hobbs Act was not designed to change the federal-state balance where a simple robbery of a discount store would be more suitably prosecuted under Michigan

Viewed in this light, the *Sutton* decision may be more a blessing than an obstacle since final determination could be forthcoming.

IV. CONCLUSION

Critics of RICO take the simplistic approach that the statute should be limited, in accord with the *Sutton* majority, or scrapped altogether. Many factors result in this strong temptation to accept the *Sutton* decision. RICO's potential for abuse has been realized in selected instances. The statute's legislative history points to a restricted use. The recognition that the statute really only provides heavier penalties once the two underlying offenses are proven, indicates that the statute does not make new conduct criminal, but, instead, merely results in an "aggravated" form of existing crimes. All of these factors result in questioning the need for RICO, or at least in favoring the clear, decisive reasoning of the *Sutton* majority.

Proponents of RICO take the opposite view that to limit the statute to conform to the *Sutton* holding allows criminal activities to go unpunished. In addition, the restrictive holding contravenes the broad remedial purpose for which the statute was enacted: to serve as an affirmative weapon against organized crime.

It seems clear that the *Sutton* majority is making a statement about abuse of RICO. The court sought to reverse the statute's incursion into state criminal law enforcement; it sought to criticize its colleagues in five other circuits for their superficial reasoning; and most importantly, it sought to warn federal prosecutors of the inherent potential for abuse within the statute.²²⁵

But *Sutton* goes too far. It cuts off the statute's foot to cure a

law. In effect, the *Yokley* court required "racketeering" before the statute could be invoked just as the *Sutton* court required a legitimate enterprise. The *Yokley* interpretation was rejected in *United States v. Culbert*, 435 U.S. 371 (1978), where the Court did not require proof of "racketeering" as an element of the crime. (It should be noted that "racketeering" is not mentioned in the Hobbs Act, just as "legitimate" is not mentioned in RICO). In *Culbert*, the Court placed strong reliance on the statutory language. Obviously, the *Sutton* dissent is offering this analogy as a foreshadowing of the result the Supreme Court will reach should *Sutton* be appealed.

²²⁵ There is also a pragmatic side of *Sutton's* restrictive holding which tends to make it more palatable. Because RICO requires at least two underlying criminal offenses to establish a "pattern," RICO section 1961(5), the defendants are subject to penalties for these underlying acts in addition to penalties on the RICO counts. In *Sutton*, each defendant was convicted of at least one drug offense and some were convicted of many of the other offenses, hence the defendants are not totally escaping criminal liability. The *Sutton* holding is not "opening the jail doors." In addition, federal prosecutors are not left without weapons to fight "illegitimate enterprises." They may still resort to conspiracy law (18 U.S.C. § 371 (1976)) or, as in this case involving drug offenses, the "Continuing Criminal Enterprise" statute (21 U.S.C. § 848 (1976)).

hangnail. As indicated, the courts are already beginning to recognize the statute's abuse potential.²²⁶ As this awareness increases, the courts will fashion rules to regulate RICO prosecutions. In addition, the lesson from *Sutton* will not go unlearned by the Justice Department. It is unlikely that the Department will jeopardize existing legitimate prosecutions by abusing the statute and run the risk of another draconian interpretation by a court following *Sutton*. Also, the Department will become more proficient in the statute's use as time progresses, thereby utilizing the extraordinary remedies of forfeiture and divestiture against legitimate organized crime targets.

The trend toward more effective prosecutorial use of RICO seems to be on the horizon now. The various Strike Forces are making inroads into bastions of organized crime.²²⁷ It must be recognized that the statute is in its infancy and thus needs time to grow. Eventually, it should be successful in attaining its goal, the prevention of infiltration of business by racketeers, but should something go awry, the warning of *Sutton* can always be resurrected.

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²²⁶ See notes 174-79 *supra* and accompanying text.

²²⁷ The Justice Department's manual on RICO, DEPT JUST. MANUAL, note 43 *supra*, abstracts the cases where indictments are proposed by each Strike Force. Although some may arguably include illegitimate enterprises, the targets at least seem to involve Mafia connections. For example: the Brooklyn Strike Force is investigating a large scale loansharking operation involving the Evola *La Cosa Nostra* family; the Chicago Strike Force has uncovered an interstate auto parts operations supplied by stolen car rings; the Cleveland Strike Force is investigating a massive real estate fraud scheme involving local *La Cosa Nostra* members; the Detroit Strike Force is investigating numerous investments by reputed *La Cosa Nostra* members in legitimate businesses in and around Detroit (some cases involve killings to gain control); the Los Angeles Strike Force is investigating a million dollar acquisition of International Monetary Fund assets through threats and violence by *La Cosa Nostra* members; the New Orleans Strike Force is investigating the take-over of a night club by two high echelon *La Cosa Nostra* members; and the New York Strike Force is investigating the infiltration of the city's garment district by organized crime figures. DEPT JUST. MANUAL, note 43 *supra*.